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No. 1324

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CONSOL PENNSYLVANIA COAL COMPANY, et al.,

Petitioners,

vs.

JAMES E. HUGHES, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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February 14, 1992

Questions Presented

1. Did not the Third Circuit violate the rules of *Haslip*,[1] adopted under the Due Process Clause to fortify judicial control over excessive awards of punitive damages, and misapply the abuse of discretion standard of review, when it vacated a second jury's punitive award of $674,000, and reinstated the first jury's punitive award of $5,500,000, which the District Court had set aside on the ground that the compensatory and punitive awards were "obscenely excessive"?

2. Does not the great disparity between two awards of punitive damages in the same case, on the same evidence, and on relevantly similar instructions to two juries, and the uncertainty in the Courts of Appeals about the relation to federal procedure of Alabama rules approved in *Haslip*, require that the standards of *Haslip* be refined to satisfy the Due Process Clause?

3. Did not the Third Circuit fail to pay sufficient deference to the district judge's order setting aside the first jury's award of *compensatory* damages under the federal abuse of discretion standard of review?

4. In relation to the *second* jury's award of punitive damages, did not the District Court abuse its discretion as a matter of law, and deny due process to petitioners, in refusing to charge the second jury, as required by Pennsylvania law, that petitioners' conduct must be found "outrageous" as a prerequisite to an award of punitive damages?

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[1] *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S.Ct. 1032 (1991).

Parties to the Proceeding

The petitioners joining in this petition are: Consol Pennsylvania Coal Company; Greenon Coal Company (formerly called Rheinbraun U.S. Corporation); The Monongahela Railway Company; Consolidation Coal Company; Consol Land Development Company; Maria Theresia Bergbaugesellschaft mbH; and Rheinbraun A.G.

Other petitioners are: William Reese; David Boggs; Ewing Pollock; Pollock, Pollock and Thomas; The Upshur Agency, Inc.[2]

The respondents are: James E. Hughes; Linda L. Hughes; Dorothy Loughman; Paul H. Kent; Mabel Kent; James C. McIntyre; Glenna McIntyre; Larry Levine; Dan Levine; Morris Levine; Edward Levine; Morris Levine Enterprises, Inc.; Levine Iron & Metal Inc.; John W. Yesenosky Jr.; Linda M. Yesenosky; Thomas J. Allen and Estate of John T. Throckmorton; Mark E. Headlee; and Charlotte B. Headlee.

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[2] Pursuant to Rule 29.1, we advise the Court that the corporate petitioners are owned as follows:

Consol Pennsylvania Coal Company is a subsidiary of Consolidation Coal Company.

Greenon Coal Company is a subsidiary of Consol Energy, Inc. The latter is a subsidiary of Du Pont Energy Company, Rheinbraun A.G., and Rheinbraun U.S. GmbH.

Du Pont Energy Company is a subsidiary of E.I. Du Pont De Nemours and Company.

Consolidation Coal Company is a subsidiary of Consol Energy Inc. Conso. Land Development Company was merged into Consolidation Coal Company in 1987.

Rheinbraun A.G. and Rheinbraun U.S. GmbH are subsidiaries of RWE AG.

Maria Theresia Bergbaugesellschaft is subsidiary of Rheinbraun AG.

The Monongahela Railway Company is a subsidiary of Consolidated Rail Corporation.

The Upshur Agency, Inc., does not have a parent corporation.

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The petitioners joining in this petition respectfully pray that a writ of certiorari issue to review the amended judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this action on December 20, 1991.

Opinions Below

There have been three relevant opinions below, two by the United States District Court for the Western District of Pennsylvania and one, amended and restated opinion by the United States Court of Appeals for the Third Circuit:

1. *Loughman v. Consol - Pennsylvania Coal Co.*, No. 83-921 (U.S.D.C.W.D.Pa., Oct. 22, 1987) (Teitelbaum, D.J.) (ordering partial new trial) (unreported) (A-97);[3]

2. *Loughman v. Consol - Pennsylvania Coal Co.*, 740 F.Supp. 1114 (W.D. Pa. 1990) (Smith, D.J.) (denying post-trial motions after second trial) (A-75); and

3. *Hughes v. Consol - Pennsylvania Coal Co.*, No. 90-3466 (3d Cir. Dec. 20, 1991) (Nygaard, C.J.) (vacating second damages award and reinstating first) (amended and restated opinion) (A-1).[4]

Jurisdiction

These were eight consolidated actions for fraud and conspiracy under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§1961-1968 (1988 & Supp. 1989) ("RICO"), and at common law. The District Court had subject-matter jurisdiction under 28 U.S.C. §1331 (1988) and, as to the state law claims, on principles of pendent jurisdiction. The Court of Appeals had jurisdiction to hear the appeal from the final judgment of the District Court under 28 U.S.C. §1291 (1988). The original opinion of the Court of Appeals issued September 20, 1991, and is reported at 945 F.2d 594. Timely petitions for rehearing with suggestions of rehearing *en banc* were filed by petitioners and respondents. Petitioners' petition was denied on October 23, 1991. Respondents' petition was denied on December 20, 1991. The amended and restated opinion and judgment of the Court

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[3] References to pages of the appendix are in the form "(A____)".

[4] The original opinion of the Third Circuit is reported at 945 F.2d 594. The opinion of December 20, 1991, amends and restates the original opinion in its entirety (A-1).

of Appeals were entered December 20, 1991. This petition for a writ of certiorari was filed within 90 days of that date. Sup. Ct. R. 13.1. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) (1988).

Constitutional Provision Involved

The Fifth Amendment to the United States Constitution provides in pertinent part that "[n]o person shall be. . . deprived of life, liberty, or property, without due process of law; . . . ."

STATEMENT OF THE CASE

Preliminary Statement

These cases present for review, in the context of the Due Process Clause, the failure of a United States Court of Appeals to apply rules established by this Court for judicial supervision of jury awards of punitive damages. *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S.Ct. 1032 (1991). The Courts of Appeals, generally, have been uncertain about the application to federal procedure of the Alabama rules approved in *Haslip*, and guidance by this Court is required. *See infra* p. 15.

The cases also concern the misapplication by the Court of Appeals of the "abuse of discretion" standard to the review of a District Court's order of a partial new trial to redetermine damages, compensatory and punitive. The partial new trial was granted by a highly experienced district judge because, on the "overwhelming evidence", the damages awarded by the first jury were (in his extraordinary, condemnatory phrase) "obscenely excessive". (A-98). On appeal from the judgment on the second jury's verdict the Court of Appeals vacated the second jury's lesser award of damages, compensatory and punitive, and reinstated the enormous award of compensatory and punitive damages of the first jury.

With particular reference to punitive damages, the first jury awarded $5,500,000. On the retrial, the second jury awarded less than 13% of that sum, i.e., $674,000. The Third Circuit disregarded due process requirements when it overrode the trial judge's constitutionally-grounded authority over exorbitant awards of punitive damages. Moreover, the remarkable discrepancy between the two punitive awards, in the same case,

on the same evidence, and on relevantly similar instructions to the jury, confirms that the *Haslip* rules must be refined.

Proceedings in the District Court

a. The Factual Background[5]

In 1981, petitioners Consolidation Coal Company ("Consol"), a coal producer based in Pittsburgh, Pennsylvania, and Rheinbraun A.G., a coal producer of Cologne, Germany, and affiliates (collectively, the "Consol Petitioners"), formed a joint venture to develop coal reserves near Waynesburg, Pennsylvania. The mine was to be located near the junction of a railroad operated by The Monongahela Railway Company ("Monongahela"). Construction of a spur on a right-of-way running from the mine to the junction was necessary. As planned, the right-of-way would run over largely vacant, rural parcels of land. By October 1983, all parcels necessary for the right-of-way were purchased by the Consol Petitioners.

In early 1983, of more than 50 selling landowners, respondents filed eight actions in the United States District Court for the Western District of Pennsylvania (Pittsburgh) against the Consol Petitioners, the Monongahela, and others. The respondents alleged fraud and conspiracy under the RICO statute, 18 U.S.C. §§1961-68 (1988 & Supp. 1989), and at common law, perpetrated by petitioners during negotiations for the purchase of their parcels. The frauds alleged included false statements that only the Monongahela, and not Consol, was involved in the purchases, and that part of the purchase price would be tax-free to the sellers. Respondents demanded compensatory and punitive damages.

b. The First Trial

The cases were consolidated and tried to a jury in early 1987. Judge Hubert I. Teitelbaum, a judge of long experience in the Pittsburgh federal district, presided. The trial included a jury view of the parcels sold by each respondent, in which Judge Teitelbaum participated.

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[5] Summary of facts as stated by the Court of Appeals. (A-40).

With respect to respondents' claims for punitive damages the judge charged the first jury that if the conduct of petitioners was found to be "outrageous" the jury could award punitive damages "in order to punish said defendants [petitioners] for their conduct and to deter the defendants [petitioners] and others from the commission of like acts". (A-127). To determine the amount of punitive damages for which each of the petitioners might be liable, the judge charged that the jury could consider the character of each petitioner's act, the harm to the respondent, and the "wealth" of each petitioner in order "to punish him and deter him and others from like conduct in the future". (A-128). The judge added that "[t]he amount you assess as punitive damages must bear a reasonable relationship to the amount you choose to award as compensatory damages." (A-128).

The first jury found most of the petitioners, including the Consol Petitioners, liable on one or more claims, and awarded compensatory damages aggregating $5,360,500. The jury also awarded punitive damages aggregating $5,500,000 against specific petitioners, including Consol and the Monongahela.

On October 22, 1987, however, Judge Teitelbaum granted petitioners' motion for judgment n.o.v. on the RICO claims and, in respect of the pendent state law claims, ordered a partial new trial of the damages issue (after respondents refused a remittitur), characterizing the jury's award, twice, as "obscenely excessive." (A-98 and A-113). He explained that the "overwhelming evidence" indicated that respondents' properties (which the judge himself had viewed) were worth far less than the values found by the jury (A-110):

> For example, the jury awarded the Hughes' (Civil Action No. 876-1678) $122,000 in damages, even though they had purchased that same property some four years earlier for a mere $9,500. Dorothy Loughman (Civil Action No. 83-921) had sold ten acres of her property for only $800 per acre approximately six years prior to the sale of another portion of the same property to defendants. The jury, however, awarded

> her damages amounting to approximately $100,000 per acre for the portion of her property she sold to defendants. The Yesenoskys had listed their property as being for sale in 1980 for $40,000. The jury awarded the Yesenoskys $435,000 in damages for the sale of their property to defendants less than two years later.

Judge Teitelbaum also held that respondents' witness on real estate valuation, Mr. Bodnar, adopted an untenable theory of valuation. Bodnar's method was to value the respondents' parcels on the basis of the enormous prices paid to the last three of 50 sellers in a linear series of parcels, purchased by the Consol Petitioners as they rushed to complete their mining project. The judge said (A-111) that the jury

> obviously relied heavily on the testimony of Mr. Bodnar, who explained on cross-examination that his figures were based largely on the prices paid to three (out of some fifty) landowners who were the last to sell their properties for the railroad right-of-way: Grover Phillipi ($146,670 per acre), John Culp ($75,216 per acre); and Sarah Closser ($240,108 per acre). All other sales, except for these three, were ignored by Mr. Bodnar in ascertaining the fair market value of plaintiffs' properties. *** *It defies reason* to infer that these three sales, all of them by "hold-outs", are indicative in any way of the fair market values of the properties of those who were among the earliest to sell. *It is far more reasonable to infer* that the prices paid to Phillipi, Culp, and Closser for their properties were far in excess of their true market values - because the defendants were operating under severe time constraints - than it is to infer that the fair market values of plaintiffs' properties can be based on the prices paid to Phillipi, Culp, and Closser. (emphasis supplied).

The trial judge's analysis was thus founded in reason and on inferences from the evidence that he was specially qualified to

make. As Pennsylvania law precluded an award of punitive damages absent an award of compensatory damages, and as any award of punitive damages could not have borne a "reasonable relationship" to an incompetent award of compensatory damages, the judge set aside the entire award. *See infra* p. 11, n. 9.

The judge's dismissal of respondents' RICO claims was sustained in due course.[6]

c. The Second Trial

On March 6, 1990, a second jury trial commenced before Judge D. Brooks Smith. The same evidence relevant to petitioners' supposed misconduct was heard by the second jury. In his charge to the second jury on punitive damages, Judge Smith, like Judge Teitelbaum, instructed that the purpose of an award of punitive damages was to punish and deter, and that the jury might take into account the wealth of petitioners (A-125). But Judge Smith refused to charge the jury that petitioners' conduct must be found "outrageous" to justify punitive damages; in his mistaken view the issue had been decided at the first trial (*see infra* p. 19).[7]

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[6] Judge Teitelbaum initially held that the evidence did not prove ongoing misconduct. Respondents moved to reconsider in light of more recent Third Circuit authority and Judge Teitelbaum vacated the RICO dismissal. After this Court decided *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989), however, the district court (Smith, D.J.) reinstated the dismissal of the RICO claims. *Loughman v. Consol Pennsylvania Coal Co.*, 740 F.Supp. 1114 (W.D. Pa. 1990), *aff'd in relevant part sub. nom. Hughes v. Consol Pennsylvania Coal Co.*, No. 90-3466 (3d Cir. Dec. 20, 1991) (amended opinion) (A-1).

[7] Judge Smith also omitted to charge that there must be a reasonable relationship between compensatory and punitive damages (A-75). Pennsylvania law had changed on the point between the date of Judge Teitelbaum's charge and Judge Smith's. *See Loughman*, 740 F.Supp. at 1124, citing *Kirkbride v. Lisbon Contractors, Inc.*, 521 Pa. 97, 555 A.2d 800 (1989) (changing former rule) (A-86).

On April 6, 1990, on these instructions and on the same evidence of misconduct, the second jury awarded punitive damages of only $674,000, or less than 13% of the first jury's award. Compensatory damages of $4,262,677 were also awarded, about $1.1 million less than the amount awarded by the first jury.

At the close of the second trial, petitioners moved on April 20, 1990, for judgment n.o.v. and for a new trial on the ground (among others) that they were denied due process because Pennsylvania law did not provide the jury with adequate standards for awarding punitive damages.[8] The motion was denied by Judge Smith. (A-88).

Proceedings in the Third Circuit

Petitioners and respondents appealed to the Third Circuit. Petitioners contended that the awards of compensatory and punitive damages by the second jury were unsupported by competent evidence and violated the Due Process Clause.

The Court of Appeals (per Nygaard, C.J.) disregarded the results of the second trial. Purporting to apply an "abuse of discretion" standard of review to Judge Teitelbaum's original order of October 22, 1987, granting a new trial of damages, the Third Circuit held that Judge Teitelbaum erred in setting aside the first jury's award of damages. The Circuit simply vacated the second jury's award in its entirety and reinstated the first award, including its immense award of punitive damages. *Hughes v. Consol Pennsylvania Coal Co.*, No. 90-3466 (3d Cir. Dec. 20, 1991) (amended opinion) (A-67).

With respect to the first jury's award of compensatory damages, the panel rejected Judge Teitelbaum's assessment of

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[8] Petitioners' motion stated: "The law of Pennsylvania did not provide the jury with sufficient guidance in determining whether to award punitive damages (and, if so, how much) so that the jury's award of punitive damages in this case was purely arbitrary and violated the Defendants' rights of due process under the United States Constitution, as would any award of punitive damages under the prevailing statutory scheme in Pennsylvania". *Motion of Defendant for Judgment Notwithstanding the Verdict and for a New Trial*, April 20, 1990, at 6.

the "overwhelming evidence", and his inferences therefrom, relating to the value of respondents' parcels. Ignoring the trial judge's direct knowledge of the terrain and his specification of the trivial prices at which several of the parcels had been bought and sold shortly before the sales to the Consol Petitioners, and solely on the basis of a contrary inference from Bodnar's testimony, Judge Nygaard reinstated the first jury's award in the teeth of Judge Teitelbaum's castigating repudiation of it (A-60):

> Though the district court correctly characterized Closser, Culp and Phillipi as "hold-outs", it neglected to consider that plaintiffs would have demanded more money had they known what Closser, Culp and Phillips knew - that Consol was involved and that Monongahela could not have condemned their properties for fixed prices. . .The district court abused its discretion by discounting Bodnar's testimony and setting aside the first damage award.

Judge Nygaard's assertion that the respondents would have demanded more money had they known what the holdouts knew was speculation unsupported by the record and contrary to findings and inferences of the trial judge based on the "overwhelming evidence". Under the abuse of discretion standard as applied to issues of fact a Court of Appeals may not engage in such speculation. *See infra* pp. 16-17.

With respect to the punitive damages award, the Court of Appeals also reinstated the first jury's award of $5,500,000. For the same conduct the second jury had awarded punitive damages of only $674,000, less than one-eighth the first award.

The Court of Appeals did not reinstate the first jury's award of compensatory damages and affirm the second jury's award of punitive damages; nor did it order a remittitur of compensatory or punitive damages by respondents; nor did it order a new trial of all damages issues. *Cf. American Employers Ins. Co. v. Southern Seeding Services, Inc.*, 931 F.2d 1453, 1458 (11th Cir. 1991) (affirming compensatory award but remanding punitive award to reflect *Haslip* standards on record).

REASONS FOR GRANTING THE WRIT

Summary of Argument

These cases involve recurring issues of compelling importance to the administration of federal justice.

First, the Court's requirement, expressed as a matter of due process, that there must be "scrutiny" of punitive jury awards by the trial judge to ensure "meaningful and adequate" review, was flouted by the Court of Appeals when it reinstated the first jury's colossal award of compensatory and punitive damages, set aside by the trial judge, and disregarded the greatly reduced award made by the second jury. The purpose of such judicial scrutiny, after all, is to reduce the jury's excesses. *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S.Ct. 1032, 1044 (1991).

Second, a Court of Appeals must ordinarily review a District Court's factually-grounded order of a new trial of damages under an extremely deferential "abuse of discretion" standard. In relation to *punitive* damages that familiar standard is affected by the Due Process Clause and means that when a District Court orders a new trial of punitive damages after a fact-intensive inquiry, the district judge must be sustained unless wrong beyond all question. Here, the Third Circuit ignored the principle.

Third, the Court's resolution in *Haslip* of the conflict between the old remedy of punitive damages and evolving standards of due process must be refined. The instructions given to both juries were relevantly similar but yielded, on the same evidence, grossly disparate punitive awards. The disparity confirms that Pennsylvania jury instructions respecting punitive damages, typical of many, are too vague to comport with procedural due process. Further, recent, perplexed attempts by several Courts of Appeals to incorporate the Alabama rules of *Haslip* into federal procedure show that guidance from this Court is required.

Fourth, in relation to the first jury's award of *compensatory* damages, the Third Circuit misapplied the usual federal abuse of discretion standard to Judge Teitelbaum's order of a new trial, for that order was based on a fact-intensive inquiry and should have been paid the greatest deference.

Finally, under established federal practice the *second* jury's award was flawed. The judge refused to instruct the second jury that it must find petitioners' conduct "outrageous" if punitive damages were to be awarded. That failure violated Pennsylvania law and the judge's federal duty to apply that law to the case.

I

THE THIRD CIRCUIT DENIED TO PETITIONERS PROCEDURAL SAFEGUARDS OF THE DUE PROCESS CLAUSE WHEN IT REINSTATED THE FIRST JURY'S EXORBITANT AWARD OF PUNITIVE DAMAGES.

A. *The Third Circuit Misapprehended the Reinforcing Effect of Haslip on Judge Teitelbaum's Order.*

In *Haslip*, 111 S.Ct. 1032, the Court held that an award of punitive damages entails the infliction of punishment and therefore implicates the Due Process Clause, but that due process was observed by an Alabama state court jury's award of punitive damages in these circumstances:

1. *Trial Judge Scrutiny*: Alabama had established post-trial procedures for scrutinizing punitive awards by the *trial judge*. The trial judge was required to reevaluate the "culpability of the defendant's conduct" and other factors to ensure that the award was not excessive. *Id.* at 1044.

Here, Judge Teitelbaum, proceeding (before *Haslip*) under the more general federal standard applicable to motions for a new trial, Fed. R. Civ. P. 59, scrutinized the jury's award of compensatory damages and found it "obscenely excessive"; it was automatic, therefore, that he must quash a punitive award attached to an outrageous compensatory award.[9] The Third

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[9] Although Judge Teitelbaum did not express the point, it is implicit that the jury's award of punitive damages could not stand absent a compensatory award, *Emerick v. United States Suzuki Motor Corp.*, 750 F.2d 19, 22 (3d Cir. 1984), and could not bear a "reasonable relationship" to an award of compensatory damages that was a nullity, a relationship then required by Pennsylvania law. *See Kirkbride v. Lisbon Contractors, Inc.*, 521 Pa. 97, 555 A.2d 800 (1989) (changing former rule).

Circuit, without mention of *Haslip* (decided 10 months earlier), reinstated the first jury's award including its punitive component and defeated Judge Teitelbaum's constitutionally authorized post-trial check on the jury's extravagance.

2. *Appellate Check*: In *Haslip*, the Alabama Supreme Court was seen to provide "an additional *check* on the jury's or trial court's discretion" by undertaking a comparative analysis of the award and then applying the "detailed substantive standards it has developed for evaluating punitive awards." *Id.* at 1045 (emphasis supplied). In Alabama, those substantive standards included a seven-point check list designed to ensure reasonable punitive awards, which resulted in their reduction. *Id.* at 1045.

Here, by contrast, the Third Circuit, instead of acting as a constitutional curb on the first jury's runaway verdict (by approving or reducing the second jury's award), gave free rein to the first jury's irresponsibility for no better reason than its unsupported speculation about what respondents would have done. *See supra* p. 9. This disrespect for the trial judge's constitutionally assigned role as a check on excessive punitive awards stands at opposite poles from Alabama practice approved in *Haslip*. *Haslip* demanded that the *second* jury's punitive award be left intact, reduced, or remanded; it surely precluded the reinstatement of the enormous award of the first jury.

3. *Evidence of Petitioners' Wealth*: In *Haslip*, the Court, as a constitutional matter, particularly approved the practice that "any evidence of Pacific Mutual's wealth was excluded from the trial in accord with Alabama law." 111 S.Ct. at 1044. In the instant cases, however, both juries were instructed, in accord with Pennsylvania law, that the wealth of the petitioners could be taken into account by the jury in order to punish petitioners' appropriately. (A-125 and A-128). It is a fair inference that the first jury put heavy weight on this element, for respondents' counsel, in closing argument to that jury on February 19, 1987, said that "there's $3.9 *billion* worth of coal up there" and that "$3.9 *billion* is being made every day" by the Consol Petitioners, an absurd notion. (Tr. 2463, 2486) (emphasis supplied).

Unlike the Pacific Mutual Insurance Company, which "had the benefit of the full panoply of Alabama's procedural protections", 111 S.Ct. at 1046, petitioners here were not only denied all judicial protection by the Third Circuit but suffered additional damage at its hands. That was a denial of due process.

B. Judge Teitelbaum's Order Was Entitled to the Greatest Deference From the Court of Appeals.

Before *Haslip* the Court had made it clear that, as a matter of ordinary federal procedure, it was the duty of the district judge to review jury awards of punitive damages and determine, by reference to Fed. R. Civ. P. 59, whether a new trial or remittitur should be ordered. "The Court of Appeals should then review the District Court's determination under an abuse of discretion standard." *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989).

The effect of *Haslip* on *Browning-Ferris* was to add the force of the Due Process clause to the ordinary abuse of discretion standard. That is, by requiring the district judge to check the jury's extravagance as a constitutional matter the Court fortified the exercise of discretion by a district judge in ordering a new trial of punitive damages; a Court of Appeals must pay even greater deference to such an order. If the district judge decides that the award is excessive on the evidence and orders a new trial (or remittitur), and appeal is eventually taken, the Court of Appeals may, under *Haslip*, act as a further check on the jury and again reduce the award. 111 S.Ct. at 1045. But unless the district court has (as Judge Friendly said in another connection) "taken leave of its senses", what the Court of Appeals may *not* do under the Constitution is to reinstate the first, higher jury verdict.[10] *See Robertson Oil Co. Inc. v. Phillips Petroleum Co.*, 930 F.2d 1342, 1346-47 (8th Cir. 1991) (under *Haslip* reviewing court can reduce award). The writ should be granted to establish that principle.

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[10] *See* Henry J. Friendly, *Indiscretion About Discretion*, 31 Emory L.J. 747, 763 (1982).

C. *Haslip Must be Refined to Avoid Unconstitutional Vagueness of Instructions to Juries on Punitive Damages and to Integrate Haslip Into Federal Procedure.*

Whether or not the rules of *Haslip* were violated by the Third Circuit, these cases demonstrate that the *Haslip* rules require elaboration to avoid unconstitutional vagueness and to integrate those Alabama rules into federal procedure.

Jury instructions to determine punitive damages in Alabama and Pennsylvania do not differ greatly (except that, as noted above, the wealth of the defendant may not be taken into account in Alabama). In Alabama, the jury is told that the award of punitive damages is discretionary, that the award is intended to punish the defendant, and that the award should protect the public by deterring the defendant and others from repeating the wrong. Further, in fixing the amount of the award, an Alabama jury must consider the character and the degree of the wrong committed by the defendant. *Haslip*, 111 S.Ct. at 1037, n.1.

Similar instructions were given here to both Pittsburgh juries (A-122 and A-127).[11] Nevertheless, on the same evidence, the second jury awarded less than 13% of the amount awarded by the first jury as punitive damages, i.e., $674,000 as compared with $5,500,000. Paradoxically, the first jury was told that any punitive award must bear a reasonable relation to the compensatory award but the second jury was not so instructed; the first jury was told that petitioners' conduct must be found to be outrageous but the second jury was told to assume that fact.

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[11] In addition to instructions similar to those given in Alabama, the first Pennsylvania jury was told that punitive damages may be awarded if petitioners conduct was outrageous; the second jury was told to *assume* that petitioners conduct was outrageous because of the first jury's award, a highly prejudicial error discussed *infra*, p. 19. The first jury was told that there must be a reasonable relationship between compensatory and punitive damages; the second was not (because of an intermediate change in Pennsylvania law). *See supra* p. 7, n. 7). Both Pennsylvania juries were told that they might take into account the wealth of petitioners (A-125 and A-128).

Yet, the second jury produced a punitive verdict that was a fraction of the prior award.

The gross disparity between the two awards, in the same case, on the same evidence, on a common denominator of jury instructions (but with additional instructions more favorable to respondents given to the second jury) confirms that procedures approved in *Haslip* and used by federal courts in Pennsylvania (and elsewhere) are too vague to satisfy due process requirements, as various members of the Court have suggested. *See Haslip*, 111 S.Ct. at 1056 (O'Connor, J., dissenting); *Browning-Ferris*, 492 U.S. at 280, 282 (1989) (Brennan and Marshall, JJ., concurring; O'Connor and Stevens, JJ., concurring in part and dissenting in part).

Moreover, *Haslip* approved the constitutionality of Alabama, viz., state, court procedures for the supervision by judges of punitive jury verdicts; the case did not arise in a federal district court. Although *Browning-Ferris*, *supra* at 279, requires district judges to review punitive jury awards under Fed. R. Civ. P. 59, the Courts of Appeals, attempting to apply the teachings of *Haslip*, have been uncertain about the way in which Alabama's procedures should be incorporated into Fed. R. Civ. P. 59 and federal appellate procedure. *See, e.g., Tunis Bros. Co. Inc. v. Ford Motor Co.*, No. 90-1797 (3d Cir. Dec. 27, 1991), 1991 U.S. App. Lexis 30165, at *82-83 (uncertain whether *Haslip* requires "reasonable relationship" between compensatory award and punitive award); *Johnson v. Hugo's Skateway*, 949 F.2d 1338, 1349-53 (4th Cir. 1991) (uncertain whether Virginia standards used at trial satisfy *Haslip*, remanded for district court determination of issue); *American Employers Ins. Co. Southern Seeding Services, Inc.*, 931 F.2d 1453, 1456-58 (11th Cir. 1991) (remanded with instruction that district court reflect on the record how it applied *Haslip* standards); *Robertson Oil Co. Inc. v. Phillips Petroleum Co.*, 930 F.2d 1342, 1347 (8th Cir. 1991) (same); *Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377, 1384-86 (5th Cir. 1991) (affirming punitive award because *Haslip* purportedly applied but confusing state and federal standards of review). Indeed, even a state court has found that *Haslip* "offers little guidance as to what would be necessary to render a different

system [than Alabama's] unconstitutional." *George v. Int'l Soc. for Krishna Consciousness of Cal.*, No. D007153 (Cal. Ct. App. Jan. 30, 1992), 1992 Cal. App. Lexis 105, *115 (on remand from this Court). The writ should be granted so that additional guidance may be given to lower courts.

II

THE THIRD CIRCUIT MISAPPLIED THE ABUSE OF DISCRETION STANDARD TO JUDGE TEITELBAUM'S ORDER OF A NEW TRIAL OF COMPENSATORY DAMAGES.

In relation to Judge Teitelbaum's nullification of the first jury's award of *compensatory* damages, the dominant standard of review in the Courts of Appeals is the abuse of discretion standard. 6A J. Moore, J. Lucas, & G. Grotheer, *Moore's Federal Practice* ¶59.08[6], at 59-177 (2d ed. 1989). In the Third Circuit the standard is plainly in force and means, in respect of a district judge's disposition of post-trial motions attacking the sufficiency of the evidence, that "it will not be said that a district judge has abused its discretion if there is 'any basis in reason for [its] conclusions as to the weight of the evidence and injustice of the verdict. . . .' " *Shanno v. Magee Industrial Enterprises, Inc.*, 856 F.2d 562, 567 (3d Cir. 1988) (Sloviter, C.J., quoting Hastie, C.J., dissenting, in *Lind v. Schenley Indus.*, 278 F.2d 79, 91 (3d Cir.) (in banc), *cert. denied*, 364 U.S. 835 (1960)).[12]

Although the abuse of discretion standard is applied variously according to the issue at hand, there cannot be disagreement that, in relation to an order of a district judge founded on factual elements, the standard requires profound deference by a Court of Appeals to the judge's order. A trial judge's order of a new trial of damages predicated on the judge's analysis of the

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[12] In the instant cases the Third Circuit flagrantly misdirected itself with respect to its own standard of review. The only case cited for the standard is *Semper v. Santos*, 845 F.2d 1233 (3d Cir. 1988) (A-59). That was an appeal from the *appellate division* of the Virgin Islands District Court where the Third Circuit said that the "usual deference" paid to discretionary rulings of a district court "is inapplicable when one appellate court reviews another". *Id.* at 1235.

evidence is such an order, for it is the decision "of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart." *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 216 (1947); *see Anderson v. Bessemer City*, 470 U.S. 564, 580 (1985) (acknowledging that trial judge "is more closely in touch than the appeals court with the milieu out of which the controversy before him arises"); Henry J. Friendly, *Indiscretion About Discretion*, 31 Emory L. J. 747, 759 (1982) ("The trial court's direct contact with the witnesses places it in a superior position" to determine facts under the abuse of discretion standard).

The Court has now made it clear that "[w]hen an appellate court reviews a district court's factual findings, the abuse of discretion and clearly erroneous standards are *indistinguishable*." *Cooter & Gell v. Hartmarx Corp.*, 110 S.Ct. 2447, 2458 (1990) (emphasis supplied). The clearly erroneous standard of Fed. R. Civ. P. 52, the Court recalled, "requires the appellate court to uphold any district court determination that falls within a broad range of permissible conclusions." *Idem*; *accord Anderson*, *supra* at 574 ("[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.") Further, under the clearly erroneous rule, the trial judge's *inferences* of fact are entitled to the same respect as his factual determinations. *Id.* at 580; *United States v. United States Gypsum Co.*, 333 U.S. 364, 394 (1948). Deference to the trial judge is especially appropriate where he is better positioned than the Court of Appeals to decide the issue and the issue is factually multifarious, i.e., unyielding to useful generalizations by the appellate court. *Cooter v. Gell*, 110 S.Ct. at 2459-60; *cf. Salve Regina College v. Russell*, 111 S.Ct. 1217, 1222 (1991) (de novo review proper where district judge not "better positioned" to decide issue of state law, as opposed to mixed question of law and fact, and issue not multifarious).

Although Judge Teitelbaum's order of a new trial of damages was made under Rule 59, not Rule 52, his order draws strength from *Cooter & Gell*. Rule 59 gave the judge broad discretion to make a fact-intensive inquiry into the evidence of damage

to determine whether the award was excessive. Judge Teitelbaum made such an inquiry, as his opinion shows. *See supra* pp. 5-6. His analysis was as "fact-dependent" as a judge's inquiry into the operative facts of a lawyer's misconduct. *Cooter & Gell*, 110 S.Ct. at 2459. A highly experienced judge of the Pittsburgh district, more in touch with the "milieu" of the controversy than the Court of Appeals in Philadelphia, *Anderson*, 470 U.S. at 580, Judge Teitelbaum heard respondents' testimony about petitioners' conduct, saw respondents' properties during the jury's view, heard their testimony as to the prices at which their properties had recently been purchased and sold, and heard the Bodnar theory of value (which the judge plainly thought ridiculous). He made reasonable inferences from the evidence. *See supra* p. 6 ("it defies reason . . . it is far more reasonable to infer . . . ."). Under the clearly erroneous rule his conclusion, on the "overwhelming evidence," that the award was "obscenely excessive" should not have been disturbed by the Court of Appeals merely on the strength of a contrary inference from the Bodnar testimony. *See supra* p. 9.

III

AT THE SECOND TRIAL THE DISTRICT COURT ABUSED ITS DISCRETION AS A MATTER OF LAW, AND DENIED DUE PROCESS TO PETITIONERS, WHEN THE COURT REFUSED TO INSTRUCT THE JURY THAT IT MUST FIND PETITIONERS' CONDUCT "OUTRAGEOUS" IN ORDER TO AWARD PUNITIVE DAMAGES.

The first jury's award was rightly set aside by Judge Teitelbaum. The second jury's award of punitive damages was also defective because Judge Smith failed in his federal duty to charge the second jury that punitive damages may not be awarded under Pennsylvania law absent "outrageous" conduct.

The Court explained in *Browning-Ferris*, 492 U.S. at 279, that as a matter of *federal* law, a district judge reviewing an award of punitive damages must ensure that the jury's verdict is "within the confines set by state law." That duty commands that the judge

charge the jury respecting the standards for awarding punitive damages as required by state law. *Idem*. And, as discussed, the Court held in *Haslip* that, as a matter of due process, the trial judge must check the jury's award of punitive damages for excess, which requires that he "reflect in the record the reasons for interfering with a jury verdict, or refusing to do so, on grounds of excessiveness of the [punitive] damages." *American Employers Ins. Co. v. Southern Seeding Services, Inc.*, 931 F.2d 1453, 1457 (11th Cir. 1991) (applying *Haslip* and quoting relevant decision of Supreme Court of Alabama).

Judge Smith ignored these principles. Pennsylvania law bars an award of punitive damages unless the jury finds the relevant conduct "outrageous." *Rizzo v. Haines*, 520 Pa. 484, 507, 555 A.2d 58, 69 (1989); *Feld v. Merriam*, 506 Pa. 383, 395, 485 A.2d 742, 748 (1984). But Judge Smith charged the jury on April 2, 1990, that "you are instructed to consider only the conduct that has *previously been determined* as outrageous." (A-124) (emphasis added). This reflected his mistaken view (expressed at the supplemental pre-trial conference of March 5, 1990, and objected to there (Tr. 34-35) and again at the charging conference of March 29, 1990 (Tr. 2891)) that "a punitive damage claim is an entirely separate cause of action" and that petitioners' liability on that "cause of action" had been determined by the prior jury. In effect, he mistakenly directed the jury to presume that petitioners' conduct had been outrageous. *See Mason v. Texaco, Inc.*, 948 F.2d 1546, 1554 (10th Cir. 1991) ("A punitive damage claim is not an independent cause of action or issue separate from the balance of plaintiff's case. It is part and parcel of a liability determination and does not have any independent being until a jury has decided . . . that defendant's conduct . . . was gross, wilful, wanton or malicious. . . .").

But liability for punitive damages in Pennsylvania has always depended (inter alia) on the "character" of the act of the defendant; that requires a determination of outrageousness. *Kirkbride*, 521 Pa. at 102, 555 A.2d at 803; *see Molzof v. United States*, 112 S.Ct. 711, 715-16 (1992) (common law definition of punitive damages focuses on nature of defendant's conduct). As the first

jury's award of punitive damages had been nullified, any determination it may have made about the outrageousness of petitioners' conduct disappeared. It fell to the second jury to redetermine the issue. Its determination to award punitive damages required an evidentiary *finding*, not a presumption directed by the judge, of outrageous conduct.

After the second jury awarded $674,000 in punitive damages, Judge Smith denied petitioners' motion for a new trial without comment. In refusing to rectify his erroneous charge Judge Smith abused his discretion on a point of law, a decision reviewable de novo and that should have been reversed. *Salve Regina College*, 111 S.Ct. at 1222. By the same token his refusal was a denial of the due process "check" required by *Haslip* in that he failed to express on the record the reasons for the denial. *American Employers*, *supra*, at 1456-58. Although petitioners vigorously argued the point on their appeal, *Brief of Defendants-Appellees*, Nov. 8, 1990, at 66-67, the Third Circuit ignored the matter, simply holding that respondents "clearly showed outrageous conduct" (A-62), as if that after-the-fact "finding" by appellate judges could cure a jury verdict founded on a materially defective charge about an intensely factual issue.

The writ should be granted to correct an error in federal procedure highly prejudicial to petitioners, namely, the failure of the District Court to ensure that, at the second trial, the "confines" of state law applicable to punitive damages were observed, and to give effect to the "check" on the jury required by the Due Process Clause.

CONCLUSION

In reinstating the first jury's punitive award the Third Circuit failed to appreciate that its powers of review of Judge Teitelbaum's order were sharply curtailed by *Haslip*.

The Court of Appeals also failed to pay sufficient deference to Judge Teitelbaum's order setting aside the compensatory award of the first jury under the abuse of discretion standard.

Finally, Judge Smith, at the second trial, abused his discretion as a matter of law in denying petitioners' motion for a new trial.

The writ should be granted to rectify these errors and to settle recurring problems of federal law.

Respectfully submitted,

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February 14, 1992.

APPENDIX

AMENDED

Filed December 20, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-3466

JAMES E. HUGHES and LINDA L. HUGHES,

Appellant

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
WILLIAM REESE, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL CO.;
CONSOL-LAND DEVELOPMENT CO.
MARIA THERESIA BERGBAUGESELLSCHAFT MBH &
RHEINISCHE BRAUNKOHLENWERKE

No. 90-3467

DOROTHY LOUGHMAN,

Appellant

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
RHEINBRAUN VERKAUFSGESELLSCHAFT, MBLT. AND MARIA THERESE VERKAUFSGESELLSCHAFT;
MARIA THERESIA BERGBAUGESELLSCHAFT, MBH &
RHEINISCHE BRAUNKOHLENWERKE

No. 90-3468

PAUL H. KENT and MABEL KENT,

Appellants

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a

corporation;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and
the law firm of POLLOCK, POLLOCK AND
THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
MARIA THERESIA BERGBAUGESELLSCHAFT,
MBH &
RHEINISCHE BRAUNKOHLENWERKE

No. 90-3469

JAMES C. McINTYRE and GLENNA McINTYRE,

Appellants

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a
corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a
corporation;
MIKE WILSON, an individual;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and
the law firm of POLLOCK, POLLOCK AND
THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;

RHEINBRAUN VERKAUFSGESELLSCHAFT, MBLT
and
MARIA THERESE VERKAUFSGESELLSCHAFT;
MARIA THERESIA BERGBAUGESELLSCHAFT,
MBH &
RHEINISCHE BRAUNKOHLENWERKE

No. 90-3470

LARRY LEVINE, DAN LEVINE, MORRIS LEVINE,
EDWARD LEVINE, individuals; and
MORRIS LEVINE ENTERPRISES, INC., a
corporation;
and LEVINE IRON AND METAL, INC., a
corporation,

Appellants

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a
corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a
corporation;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and
the law firm of POLLOCK, POLLOCK AND
THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
RHEINBRAUN VERKAUFSGESELLSCHAFT, MBLT
and

MARIA THERESE VERKAUFSGESELLSCHAFT;
MARIA THERESIA BERGBAUGESELLSCHAFT,
MBH &
HEINISCHE BRAUNKOHLENWERKE

No. 90-3471

DOROTHY LOUGHMAN

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
RHEINBRAUN VERKAUFSGESELLSCHAFT, MBLT
and
MARIA THERESE VERKAUFSGESELLSCHAFT;
MARIA THERESIA BERGBAUGESELLSCHAFT,
MBH &
RHEINISCHE BRAUNKOHLENWERKE
Consol-Pennsylvania Coal Company,
Consolidated Coal Co.,
Consol-Land Development Company, and
The Monongahela Railway Company,

Appellants

No. 90-3472

DOROTHY LOUGHMAN

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
RHEINBRAUN VERKAUFSGESELLSCHAFT, MBLT and
MARIA THERESE VERKAUFSGESELLSCHAFT;
MARIA THERESIA BERGBAUGESELLSCHAFT, MBH &
RHEINISCHE BRAUNKOHLENWERKE

Rhein Braun U.S., a corporation, Maria Theresia Bergbaugesellschaft MBH, and Rheinische Braunkohlenwerke,

Appellants

No. 91-3473

DOROTHY LOUGHMAN

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
WILLIAM REESE, an individual;
MIKE WILSON, an individual;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
RHEINBRAUN VERKAUFSGESELLSCHAFT, MBLT and
MARIA THERESE VERKAUFSGESELLSCHAFT;
MARIA THERESIA BERGBAUGESELLSCHAFT, MBH &
RHEINISCHE BRAUNKOHLENWERKE

David Boggs, an individual,
The Upshur Agency, Inc.,
William Reese, an individual,
Mike Wilson, an individual,

Appellants

No. 90-3474

JOHN W. YESENOSKY, JR. and LINDA M. YESENOSKY

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
WILLIAM REESE, an individual;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
RHEINBRAUN VERKAUFSGESELLSCHAFT, MBLT and
MARIA THERESE VERKAUFSGESELLSCHAFT;
MARIA THERESIA BERGBAUGESELLSCHAFT, MBH &
RHEINISCHE BRAUNKOHLENWERKE

Consol-Pennsylvania Coal Company, Consolidated Coal Company, Consol-Land Development Company, and the Monongahela Railway Company,

Appellants

No. 90-3475

JOHN W. YESENOSKY, JR. and LINDA M. YESENOSKY

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
WILLIAM REESE, an individual;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
RHEINBRAUN VERKAUFSGESELLSCHAFT, MBLT and
MARIA THERESE VERKAUFSGESELLSCHAFT;
MARIA THERESIA BERGBAUGESELLSCHAFT, MBH &
RHEINISCHE BRAUNKOHLENWERKE

Rhein Braun U.S., a corporation, Maria Theresia Bergbaugesellschaft, MBH, and Rheinische Braunkohlenwerke,

Appellants

No. 90-3476

PAUL H. KENT and MABEL KENT

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
MARIA THERESIA BERGBAUGESELLSCHAFT, MBH &
RHEINISCHE BRAUNKOHLENWERKE

Consol-Pennsylvania Coal Company, a corporation,
Monongahela Railway Company, a corporation,
Consolidated Coal Company,
Consol-Land Development Company,

Appellants

No. 90-3477

PAUL H. KENT and MABEL KENT

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
MARIA THERESIA BERGBAUGESELLSCHAFT, MBH &
RHEINISCHE BRAUNKOHLENWERKE

Rhein Braun U.S., a corporation,
Maria Theresia Bergbaugesellschaft MBH,
Rheinische Braunkohlenwerke,

Appellants

No. 90-3478

JAMES C. McINTYRE and GLENNA McINTYRE

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
MIKE WILSON, an individual;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and
the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
RHEINBRAUN VERKAUFSGESELLSCHAFT, MBLT
and
MARIA THERESE VERKAUFSGESELLSCHAFT;
MARIA THERESIA BERGBAUGESELLSCHAFT, MBH &
RHEINISCHE BRAUNKOHLENWERKE

Consol-Pennsylvania Coal Company, a corporation,
Monongahela Railway Company, a corporation,
Consolidated Coal Company,
Consol-Land Development Company,

Appellants

No. 90-3479

JAMES C. McINTYRE and GLENNA McINTYRE

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
MIKE WILSON, an individual;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
RHEINBRAUN VERKAUFSGESELLSCHAFT, MBLT and
MARIA THERESE VERKAUFSGESELLSCHAFT;
MARIA THERESIA BERGBAUGESELLSCHAFT, MBH &
RHEINISCHE BRAUNKOHLENWERKE

Rhein Braun U.S., a corporation,
Maria Theresia Bergbaugesellschaft MBH,
Rheinische Braunkohlenwerke,

Appellants

No. 90-3480

LARRY LEVINE; DAN LEVINE; MORRIS LEVINE; EDWARD LEVINE; MORRIS LEVINE ENTERPRISES; LEVINE IRON & METAL

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
RHEINBRAUN VERKAUFSGESELLSCHAFT, MBLT and
MARIA THERESE VERKAUFSGESELLSCHAFT;
MARIA THERESIA BERGBAUGESELLSCHAFT, MBH &
RHEINISCHE BRAUNKOHLENWERKE

Consol-Pennsylvania Coal Company, a corporation,
Monongahela Railway Company,
Consolidated Coal Company,
Consol-Land Development Company,

Appellants

No. 90-3481

LARRY LEVINE; DAN LEVINE; MORRIS LEVINE; EDWARD LEVINE; MORRIS LEVINE ENTERPRISES; LEVINE IRON & METAL

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
MARIA THERESIA BERGBAUGESELLSCHAFT, MBH &
RHEINISCHE BRAUNKOHLENWERKE

Rhein Braun U.S., a corporation,
Maria Theresia Bergbaugesellschaft MBH,
Rheinische Braunkohlenwerke,

Appellants

No. 90-3482

JAMES HUGHES and LINDA HUGHES

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
WILLIAM REESE, an individual;
DAVID BOGGS, an individual;

EWING POLLOCK, an individual, and
the law firm of POLLOCK, POLLOCK AND
THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
MARIA THERESIA BERGBAUGESELLSCHAFT,
MBH &
RHEINISCHE BRAUNKOHLENWERKE

Consol-Pennsylvania Coal Company, a
corporation,
Monongahela Railway Company,
Consolidated Coal Company,
Consol-Land Development Company,

Appellants

No. 90-3483

JAMES HUGHES and LINDA HUGHES

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a
corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a
corporation;
WILLIAM REESE, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and
the law firm of POLLOCK, POLLOCK AND
THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;

CONSOL-LAND DEVELOPMENT COMPANY;
MARIA THERESIA BERGBAUGESELLSCHAFT, MBH &
RHEINISCHE BRAUNKOHLENWERKE

Rhein Braun U.S., a corporation,
Maria Theresia Bergbaugesellschaft MBH,
Rheinische Braunkohlenwerke,

Appellants

No. 90-3484

THOMAS J. ALLEN

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
RHEINBRAUN VERKAUFSGESELLSCHAFT, MBLT and
MARIA THERESE VERKAUFSGESELLSCHAFT;
MARIA THERESIA BERGBAUGESELLSCHAFT, MBH &
RHEINISCHE BRAUNKOHLENWERKE

Consol-Pennsylvania Coal Company, a corporation,
Monongahela Railway Company,
Consolidated Coal Company,
Consol-Land Development Company,

Appellants

No. 90-3485

THOMAS J. ALLEN

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
RHEINBRAUN VERKAUFSGESELLSCHAFT, MBLT
and
MARIA THERESE VERKAUFSGESELLSCHAFT;
MARIA THERESIA BERGBAUGESELLSCHAFT, MBH &
RHEINISCHE BRAUNKOHLENWERKE

Rhein Braun U.S., a corporation,
Maria Theresia Bergbaugesellschaft MBH,
Rheinische Braunkohlenwerke,

Appellants

No. 90-3494

DOROTHY LOUGHMAN

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
RHEINBRAUN VERKAUFSGESELLSCHAFT, MBLT and
MARIA THERESE VERKAUFSGESELLSCHAFT;
MARIA THERESIA BERGBAUGESELLSCHAFT, MBH &
RHEINISCHE BRAUNKOHLENWERKE

Ewing Pollock, and Pollock, Pollock and Thomas,

Appellants

No. 90-3495

JOHN W. YESENOSKY, JR. and LINDA M. YESENOSKY,

Appellants

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
WILLIAM REESE, an individual;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
RHEINBRAUN VERKAUFSGESELLSCHAFT, MBLT and
MARIA THERESE VERKAUFSGESELLSCHAFT;
MARIA THERESIA BERGBAUGESELLSCHAFT, MBH &
RHEINISCHE BRAUNKOHLENWERKE

No. 90-3496

JOHN W. YESENOSKY, JR. and LINDA M. YESENOSKY

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
WILLIAM REESE, an individual;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
RHEINBRAUN VERKAUFSGESELLSCHAFT, MBLT and
MARIA THERESE VERKAUFSGESELLSCHAFT;
MARIA THERESIA BERGBAUGESELLSCHAFT, MBH &
RHEINISCHE BRAUNKOHLENWERKE

Ewing Pollock, and Pollock, Pollock and Thomas,

Appellants

No. 90-3497

JOHN W. YESENOSKY, JR. and LINDA M. YESENOSKY

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
MIKE WILSON, an individual;
WILLIAM REESE, an individual;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
RHEINBRAUN VERKAUFSGESELLSCHAFT, MBLT and
MARIA THERESE VERKAUFSGESELLSCHAFT;
MARIA THERESIA BERGBAUGESELLSCHAFT, MBH &
RHEINISCHE BRAUNKOHLENWERKE

Mike Wilson, William Reese, David Boggs, The Upshur Agency, Inc.,

Appellants

No. 90-3498

PAUL H. KENT and MABEL KENT

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
MARIA THERESIA BERGBAUGESELLSCHAFT, MBH &
RHEINISCHE BRAUNKOHLENWERKE

Ewing Pollock, and Pollock, Pollock and Thomas,

Appellants

No. 90-3499

PAUL H. KENT and MABEL KENT

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
MIKE WILSON, an individual;
WILLIAM REESE, an individual;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
MARIA THERESIA BERGBAUGESELLSCHAFT, MBH &
RHEINISCHE BRAUNKOHLENWERKE

Mike Wilson, William Reese, David Boggs, The Upshur Agency, Inc.,

Appellants

No. 90-3500

JAMES C. McINTYRE and GLENNA McINTYRE

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
MIKE WILSON, an individual;

JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and
the law firm of POLLOCK, POLLOCK AND
THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
RHEINBRAUN VERKAUFSGESELLSCHAFT, MBLT
and
MARIA THERESE VERKAUFSGESELLSCHAFT;
MARIA THERESIA BERGBAUGESELLSCHAFT,
MBH &
RHEINISCHE BRAUNKOHLENWERKE

Ewing Pollock, and Pollock, Pollock and Thomas,

Appellants

No. 90-3501

JAMES C. McINTYRE and GLENNA McINTYRE

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a
corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a
corporation;
MIKE WILSON, an individual;
WILLIAM REESE, an individual;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and
the law firm of POLLOCK, POLLOCK AND

THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
RHEINBRAUN VERKAUFSGESELLSCHAFT, MBLT
and
MARIA THERESE VERKAUFSGESELLSCHAFT;
MARIA THERESIA BERGBAUGESELLSCHAFT,
MBH &
RHEINISCHE BRAUNKOHLENWERKE

Mike Wilson, William Reese, David Boggs,
The Upshur Agency, Inc.,

Appellants

No. 90-3502

LARRY LEVINE; DAN LEVINE; MORRIS LEVINE;
EDWARD LEVINE; MORRIS LEVINE
ENTERPRISES; LEVINE IRON & METAL

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a
corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a
corporation;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and
the law firm of POLLOCK, POLLOCK AND
THOMAS;
THE UPSHUR AGENCY, INC.;

CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
RHEINBRAUN VERKAUFSGESELLSCHAFT, MBLT
and
MARIA THERESE VERKAUFSGESELLSCHAFT;
MARIA THERESIA BERGBAUGESELLSCHAFT,
MBH &
RHEINISCHE BRAUNKOHLENWERKE

Ewing Pollock, and Pollock, Pollock and Thomas,

Appellants

No. 90-3503

LARRY LEVINE; DAN LEVINE; MORRIS LEVINE;
EDWARD LEVINE; MORRIS LEVINE
ENTERPRISES; LEVINE IRON & METAL

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
MIKE WILSON, an individual;
WILLIAM REESE, an individual;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and
the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;

CONSOL-LAND DEVELOPMENT COMPANY;
RHEINBRAUN VERKAUFSGESELLSCHAFT, MBLT
and
MARIA THERESE VERKAUFSGESELLSCHAFT;
MARIA THERESIA BERGBAUGESELLSCHAFT,
MBH &
RHEINISCHE BRAUNKOHLENWERKE

Mike Wilson, William Reese, David Boggs,
The Upshur Agency, Inc.,

Appellants

No. 90-3504

JAMES HUGHES and LINDA HUGHES

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a
corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a
corporation;
WILLIAM REESE, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and
the law firm of POLLOCK, POLLOCK AND
THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
MARIA THERESIA BERGBAUGESELLSCHAFT,
MBH &
RHEINISCHE BRAUNKOHLENWERKE

Ewing Pollock, and Pollock, Pollock and Thomas,

Appellants

No. 90-3505

JAMES HUGHES and LINDA HUGHES

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
MIKE WILSON, an individual;
WILLIAM REESE, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
MARIA THERESIA BERGBAUGESELLSCHAFT, MBH &
RHEINISCHE BRAUNKOHLENWERKE

Mike Wilson, William Reese, David Boggs, The Upshur Agency, Inc.,

Appellants

No. 90-3506

MARK E. HEADLEE and CHARLOTTE B. HEADLEE,

Appellants

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
RHEINBRAUN VERKAUFSGESELLSCHAFT, MBLT and
MARIA THERESE VERKAUFSGESELLSCHAFT;
MARIA THERESIA BERGBAUGESELLSCHAFT, MBH &
RHEINISCHE BRAUNKOHLENWERKE

No. 90-3507

MARK E. HEADLEE and CHARLOTTE B. HEADLEE

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
RHEINBRAUN VERKAUFSGESELLSCHAFT, MBLT and
MARIA THERESE VERKAUFSGESELLSCHAFT;
MARIA THERESIA BERGBAUGESELLSCHAFT, MBH &
RHEINISCHE BRAUNKOHLENWERKE

Consol-Pennsylvania Coal Company, a corporation,
Monongahela Railway Company,
Consolidated Coal Company,
Consol-Land Development Company,

Appellants

No. 90-3508

MARK E. HEADLEE and CHARLOTTE B. HEADLEE

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
RHEINBRAUN VERKAUFSGESELLSCHAFT, MBLT and
MARIA THERESE VERKAUFSGESELLSCHAFT;
MARIA THERESIA BERGBAUGESELLSCHAFT, MBH &
RHEINISCHE BRAUNKOHLENWERKE
Rhein Braun U.S., a corporation,
Maria Theresia Bergbaugesellschaft MBH,
Rheinische Braunkohlenwerke,

Appellants

No. 90-3509

MARK E. HEADLEE and CHARLOTTE B. HEADLEE

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
RHEINBRAUN VERKAUFSGESELLSCHAFT, MBLT and
MARIA THERESE VERKAUFSGESELLSCHAFT;
MARIA THERESIA BERGBAUGESELLSCHAFT, MBH &
RHEINISCHE BRAUNKOHLENWERKE

Ewing Pollock, and Pollock, Pollock and Thomas,

Appellants

No. 90-3510

MARK E. HEADLEE and CHARLOTTE B. HEADLEE

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
MIKE WILSON, an individual;
WILLIAM REESE, an individual;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
RHEINBRAUN VERKAUFSGESELLSCHAFT, MBLT
and
MARIA THERESE VERKAUFSGESELLSCHAFT;
MARIA THERESIA BERGBAUGESELLSCHAFT, MBH &
RHEINISCHE BRAUNKOHLENWERKE

Mike Wilson, William Reese, David Boggs, The Upshur Agency, Inc.,

_ Appellants

No. 90-3511

THOMAS J. ALLEN, Esquire, Personal Representative of the Estate of JOHN T. THROCKMORTON,

Appellants

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
RHEINBRAUN VERKAUFSGESELLSCHAFT, MBLT and
MARIA THERESE VERKAUFSGESELLSCHAFT;
MARIA THERESIA BERGBAUGESELLSCHAFT, MBH &
RHEINISCHE BRAUNKOHLENWERKE

No. 90-3512

THOMAS J. ALLEN, Esquire, Personal Representative of the Estate of JOHN T. THROCKMORTON

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
RHEINBRAUN VERKAUFSGESELLSCHAFT, MBLT and
MARIA THERESE VERKAUFSGESELLSCHAFT;
MARIA THERESIA BERGBAUGESELLSCHAFT, MBH &
RHEINISCHE BRAUNKOHLENWERKE

Ewing Pollock, and Pollock, Pollock and Thomas,

Appellants

No. 90-3513

THOMAS J. ALLEN, Esquire, Personal Representative of the Estate of JOHN T. THROCKMORTON

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
MIKE WILSON, an individual;
WILLIAM REESE, an individual;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
RHEINBRAUN VERKAUFSGESELLSCHAFT, MBLT and
MARIA THERESE VERKAUFSGESELLSCHAFT;
MARIA THERESIA BERGBAUGESELLSCHAFT, MBH &
RHEINISCHE BRAUNKOHLENWERKE

Mike Wilson, William Reese, David Boggs, The Upshur Agency, Inc.,

Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA
(D.C. Civil Action Nos. 83-00921, 83-01674, 83-01675, 83-01676, 83-01677, 83-01678, 83-01679, 83-01754)

Argued January 28, 1991

Before: SLOVITER, *Chief Judge*; NYGAARD, *Circuit Judge* and KATZ, *District Judge**

(Opinion Filed December 20, 1991)

LOUIS M. TARASI, JR., ESQUIRE (argued)
JOSEPH J. HINCHLIFFE, ESQUIRE
Tarasi & Johnson
510 Third Avenue
Pittsburgh, PA 15219
DAVID C. HOOK, ESQUIRE
Hook & Hook
P.O. Box 792
Waynesburg, PA 15370
Attorneys for Appellants in
Nos. 90-3466, 90-3467, 90-3468,
90-3469, 90-3470, 90-3495,
90-3506, 90-3511

JOSEPH A. KATARINCIC, ESQUIRE (argued)
Katarincic & Salmon
625 Liberty Avenue
2600 CNG Tower

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* Honorable Marvin Katz, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Pittsburgh, PA 15222
Attorney for Appellants in
Nos. 90-3471, 90-3474, 90-3476
90-3478, 90-3480, 90-3482,
90-3484, 90-3507

JOSEPH D. BECKER, ESQUIRE (argued)
Becker, Glynn & Melamed
299 Park Avenue
New York, NY 10171
Attorney for Appellants in
Nos. 90-3472, 90-3475, 90-3477
90-3479, 90-3481, 90-3483
90-3485, 90-3508

JAMES F. MANLEY, ESQUIRE (argued)
Burns, Manley & Little
2922 Gulf Tower
Pittsburgh, PA 15219
Attorney for Appellants in
Nos. 90-3473, 90-3497, 90-3499
90-3501, 90-3503, 90-3505,
90-3510, 90-3513

KATHRYN L.SIMPSON, ESQUIRE (argued)
VINCENT J. GROGAN, ESQUIRE
Grogan, Graffam, McGinley
& Lucchino
Three Gateway Center
22nd Floor
Pittsburgh, PA 15222
Attorney for Appellants in
Nos. 90-3494, 90-3496, 90-3498
90-3500, 90-3502, 90-3504,

90-3509, 90-3512

OPINION OF THE COURT

NYGAARD, *Circuit Judge*.

These consolidated appeals arise from a series of complaints filed by plaintiffs after Monongahela Railway Company acquired their properties and rights-of-way in trust for Consolidated Coal Company, for it to construct and operate a 14.5 mile track from a coal mine to Monongahela's main line. Plaintiffs allege that defendants, Monongahela and Consolidated Coal, among others, fraudulently misrepresented facts to obtain favorable prices. They sought lost profits on theories of civil conspiracy, common law fraud, and violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq*.

I. FACTS AND PROCEDURE

Consolidated Coal Company (Consol) acquired the Nineveh and Manor coal reserves located in Greene County, Pennsylvania. To exploit these reserves, it needed railroad rights-of-way. In December 1980, Consol signed a letter of intent with Rheinische Braunkohlenwerke A.G. (RBW) to form a joint venture to develop these mining reserves. On June 30, 1981, their affiliates, Consol-Pennsylvania Coal Company (Consol-PA) and Rheinbraun U.S. Corporation, signed an "Operating Joint Venture Agreement". On October 29, 1981, Consol and Maria Theresia Bergbaugesellshaft (MTB), a RBW subsidiary, formed Conrhein Coal Company, a partnership.

Conrhein subleased the reserves to the joint venture of Consol-PA and Rheinbraun U.S. These affiliates held the reserves as tenants in common.

The coal reserves are located about 14.5 miles from Monongahela Railroad Company's (Monongahela) main line. Consol needed a spur railroad to transport coal from the reserves. On September 30, 1981, Consol and Monongahela signed a "Property Acquisition Agreement". They agreed that Monongahela would use the railroad's eminent domain power to acquire more than fifty parcels of land owned by plaintiffs and other landowners in the "Areas of Interest". Monongahela would hold any land it acquired in trust for Consol. In the same agreement, Monongahela and Consol contracted with Upshur Agency, a real estate broker. Upshur agreed to negotiate with plaintiffs for the needed rights-of-way.

The Rheinbraun corporations were concerned that Consol would be unable to purchase the needed rights-of-way to transport the coal to the various markets. Consequently, addenda were added to their agreements. They provide that Rheinbraun could withhold $12.5 million of its $75 million total investment in the venture for each year that passed before Consol obtained the rights-of-way. If the rights-of-way were not purchased after five years, Rheinbraun could withdraw entirely from the venture.

Time was crucial. The scheme to defraud plaintiffs unfolded as follows. Upshur agents acquired the properties from plaintiffs "in the name of 'Monongahela Railroad Corporation,'" concealing the identity of the true acquirer Consol (which lacked condemnation power). App. at 1160A. Upshur told plaintiffs that if they refused

to sell Monongahela would exercise its power of eminent domain and give a fixed price per acre upon condemnation.

Following this scheme, Upshur agents approached plaintiffs and negotiated for the needed rights-of-way. Plaintiffs sold parcels to Monongahela. When some plaintiffs initially refused or hesitated, Upshur agents made thinly-veiled threats to induce them to sell. For example, an Upshur agent threatened to bring condemnation proceedings against James and Linda Hughes. The Hughes sold their 1.5 acre land for $90,000. An Upshur agent threatened to condemn Mark and Charlotte Headlee's property for $700 per acre. The Headlees sold their 26 acre land for $168,000. An Upshur agent threatened John and Linda Yesenosky, whose son was afflicted with acute asthma, that trains could be parked across their driveway. The Yesenoskys sold their 3.6 acre land for $67,000. In some of these instances, either Upshur agents or defendant attorneys told plaintiffs that part of the purchase price would be tax free.

Among the landowners, five — Grover and Imogene Phillippi, John and Sharon Culp, and Sarah Closser — either discovered Consol's undisclosed role or were land speculators. Upon the advice of their attorneys, they refused to accept Upshur's original purchase offers. Because these landowners were fully informed and on equal footing with the defendants, Upshur agents were forced to pay substantially higher prices. Specifically, the Phillippis sold 5.2 acres for $600,000 plus the installation of railroad siding. The Culps sold 13.3 acres for $1 million. And Closser sold 1.9 acres for $445,000.

On April 19, 1983, nine plaintiffs filed eight complaints against Consol, Consol-PA, Consol Land Development Company, Monongahela, RBW, MTB, Ewing Pollock, Esq., his law firm, Upshur, and Upshur agents David Boggs, William Reese and Mike Wilson. Plaintiffs alleged violations of RICO, civil conspiracy, and common law fraud. One plaintiff, Dorothy Loughman, also alleged attorney malpractice against Pollock. All eight complaints were consolidated for trial purposes.

Defendants moved for partial summary judgment on plaintiffs' claim that Upshur agents misrepresented Monongahela's power of eminent domain. They contended Monongahela had the power to condemn plaintiffs' properties. On August 6, 1986, the district court granted defendants' motion, but sent the remaining claims of fraudulent misrepresentation, RICO violations, and civil conspiracy to the jury. Finding most of the defendants liable, the jury awarded $5,360,500 in compensatory damages, trebled under RICO. *See* 18 U.S.C. § 1964(c). It also awarded $5,500,000 in punitive damage because it found defendants acted outrageously.

The district court believed the jury based its compensatory award on the testimony of plaintiffs' land valuation expert, Mr. Gary Bodnar. Bodnar opined that the highest and best use as railroad rights-of-way determines market value of the properties. Because a railroad right-of-way is commercial or industrial property, Bodnar calculated the market value by comparing the properties with purchase prices of other commercial and industrial properties as well as prices eventually obtained by Closser, the Phillippis, and the Culps.

Defendants moved for judgment n.o.v. on all claims. On October 22, 1987, the district court granted defendants' motion for the RICO claims for it concluded plaintiffs failed to satisfy RICO's "continuity" requirement. Supp. App. at 127-28. It also set aside the compensatory damage award because the award was "obscenely excessive." *Id.* at 123. The court suggested remittitur, but when the parties disagreed on the amount of damages to remit it ordered a new damages trial. Plaintiffs moved for reconsideration of the district court's orders. On May 17, 1988, the court reinstated the RICO verdicts, vacating in part its October 22, 1987 grant of judgment n.o.v. On June 9, 1988, it decided not to submit the issue of punitive damages to a second jury.

On November 20, 1989, before the start of the second trial, defendants moved to vacate the May 17 1988 order that vacated the judgment n.o.v. of October 22, 1987 and reinstated the RICO claim. On March 1, 1990, the court granted defendants' motion to vacate the May 17, 1988 order, reinstated the October 22, 1987 grant of judgment n.o.v. on the RICO claim, and ordered retrial of the punitive damages issue.

In the second trial on damages, the jury award plaintiffs $4,262,677 in compensatory damages and $674,000 in punitive damages. The defendants moved for judgment n.o.v., new trial, and reargument. The district court denied these motions. Plaintiffs and defendants filed timely appeals, alleging errors at both trial.

We address these issues raised by plaintiffs: (1) whether plaintiffs satisfied the continuity requirement under RICO; (2) whether Upshur agents misrepresented Monongahela's

condemnation power; (3) whether the district court abused its discretion by setting aside the first damage award; (4) whether plaintiffs should be entitled to prejudgment interest and delay damages; and (5) whether the district court erred by granting judgment n.o.v. on plaintiff Dorothy Loughman's legal malpractice claim.

We address these issues raised by defendants: (1) whether sufficient evidence existed to support the first jury award of punitive damages; (2) whether the district court erred by instructing the jury that a misrepresentation is actionable regardless of materiality if the misrepresentation was made knowingly; (3) whether plaintiffs justifiably relied on the Upshur agents' statements concerning the tax free nature of the property transactions; and (4) whether certain comments made by the judge in the first trial deprived defendants of a fair trial.

II. RICO CLAIM

The district court granted defendants' motion for judgment n.o.v. on the federal RICO claims because plaintiffs failed to prove the continuity prong of RICO's "pattern of racketeering activity" requirement. Memorandum Opinion of March 1, 1990 at 15 (Smith, J.). *See* 18 U.S.C. § 1962(c). We will affirm.

When reviewing a judgment n.o.v. we must construe the evidence in a light most favorable to the non-movant and search the record for the minimum quantum of evidence to support the jury verdict. *Burke v. Maassen*, 904 F.2d 178, 181 (3d Cir. 1990). Here we cannot find the minimum quantum of evidence to support continuity.

We begin our analysis with the statute. RICO, the Racketeer Influenced Corrupt Organization Act, 18 U.S.C. §§ 1961-68 (1984 & Supp. 1990), authorizes civil suits by "[a]ny person injured in his business or property by reason of a violation of [18 U.S.C. § 1962]." *Id.* § 1964(c). To prove that defendants violated section 1962, one must show "a pattern of racketeering activity." This requires commission of "at least two acts of racketeering activity." *Id.* § 1961(5). These predicate acts include violating federal mail and wire fraud statutes. 18 U.S.C. §§ 1341, 1343. Section 1961's two act requirement does not define a pattern of racketeering activity so much as it sets a minimum condition for such patterns to exist. *H.J. Inc. v. Northwestern Tel. Co.*, 492 U.S. 229, 237 (1989). The statute does not define such a pattern.

In *H.J. Inc.*, the Supreme Court held that a pattern of racketeering activity requires the predicate acts be "related, *and* that they pose a threat of continued criminal activity." 492 U.S. at 239 (emphasis in original). Predicate acts are related when they have "the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *Id.*, 492 U.S. at 240. Because the district court granted judgment n.o.v. on continuity grounds we will assume relatedness and analyze continuity only. The *H.J. Inc.* Court described continuity but fell short of defining it. Continuity is a temporal concept. It is "both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *Id.*, 492 U.S. at 241.

If a plaintiff alleges a RICO violation over a closed period ("closed-ended" scheme), she must prove a series of related predicates lasting a "substantial period of time." *Id.* at 242. If, however, she alleges a RICO violation before continuity is established ("open-ended" scheme), she must prove a "threat of continuity." *Id.* A threat of continuity exists when the predicate acts are a part of defendant's "regular way of doing business." *Id.* That is, defendant operates a "long-term association that exists for criminal purposes." *Id.*

Though the Court provides the basic structure to analyze continuity, continuity depends ultimately on the "specific facts of each case." *Id.* The Court openly invites lower courts to define it. *Id.* at 243 ("development of these concepts must await future cases").

In *Marshall-Silver Constr. Co. v. Mendel*, plaintiff alleged acts of mail fraud and extortion lasting seven months related to a scheme to force a single business entity bankrupt. 894 F.2d 593 (3d Cir. 1990). We held that the span of seven months showed "neither 'long-term' criminal conduct nor the threat thereof." *Id.* at 598.

In *Banks v. Wolk*, plaintiff alleged that two of the defendants, Wolk and Weiner, misrepresented facts to defraud him of his interest in a single piece of real estate. 918 F.2d 418 (3d Cir. 1990). The injury occurred within an eight month period and there was no threat of "future misconduct by Wolk or Weiner." *Id.* at 423. As to this closed-ended scheme, we held eight months was insufficient to show continuity. *See Kehr Packages, Inc. v. Fidelcor*, 926 F.2d 1406, 1418 (3d Cir. 1991) ("eight-month period of fraudulent activity directed at a single entity does not constitute a pattern,

absent a threat of future criminal acts"); *Hindes v. Castle*, 937 F.2d 868, 875 (3d Cir. 1991) (eight month period failed to satisfy continuity).

Contrasting *Marshall-Silver*, *Banks*, *Kehr*, and *Hindes*, we note that in *H.J. Inc.* the Court found that violations lasting six *years* were sufficient to show "substantial period of time" in a closed-ended scheme or, alternatively, to show regular way of doing business in an open-ended one. 492 U.S. at 250. In other circuits, only a period of years appears substantial. *See Fleet Credit Corp. v. Sion*, 893 F.2d 441, 447 (1st Cir. 1990) (over four years); *Walk v. Baltimore & Ohio R.R.*, 890 F.2d 688, 690 (4th Cir. 1989) (ten years); *Jacobson v. Cooper*, 882 F.2d 717, 720 (2d cir. 1989) (unspecified "matter of years"); *Dana Corp. v. Blue Cross & Blue Shield Mut. of N. Ohio*, 900 F.2d 882, 887 (6th Cir. 1990) (seventeen years).

After *H.J. Inc.*, we found continuity in two cases. Both were of the open-ended kind. That is, they involved a future threat of RICO violations. In *Swistock v. Jones*, we held that because plaintiffs alleged future violations as to "other potential transactions" plaintiff sufficiently raised the issue of whether fraud was the defendant's regular way of doing business (though the predicate acts lasted only fourteen months). 884 F.2d 755 (3d Cir. 1989). And in *Banks*, we found that some of the defendants, the Cohen brothers, used fraud as a regular way of doing business. 918 F.2d at 424. Thus as to the Cohen brothers, but not Wolk or Weiner, we found continuity.

Plaintiffs identified the RICO violation as "fraudulent misrepresentations, threats and omissions . . . [that resulted in plaintiffs selling] their property well below its true value." App. at

59 (Kent's Amended Complaint, ¶ 45.) They alleged violations of federal mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343, as the predicate acts underlying RICO violations. *See* 18 U.S.C. § 1961(1). We will examine the evidence with respect to both open- and closed-ended schemes.

As to open-ended scheme, we find no evidence that defendants used fraud as a regular way of doing business or formed an on-going criminal association. Upshur threatened plaintiffs to obtain specific parcels of property. Plaintiffs each had but one property to sell; defendants had but one area to acquire. There were no "potential" areas of interest. Once defendants obtained the property, they posed no future threat to plaintiffs or society. The defendants' fraud was not akin to the type where hoodlums sell "insurance" to storekeepers to cover them against breakage of their windows, telling their victims they would return each month to collect their "premiums". *H.J. Inc.*, 492 U.S. at 242. Theirs was akin to a one time racket to obtain a specific bounty. We find no continuity under an open-ended scheme.

As to closed-ended scheme, we find no evidence of a substantial period of time. In the first trial, Judge Teitelbaum first found no continuity and then reversed himself. In the second trial, on March 1, 1990, Judge Smith held that there was no continuity. We agree that there was no continuity.

Reviewing the record, Judge Teitelbaum made the correct factual finding: Defendants' scheme "lasted from July 1981 until sometime in early-1982." Memorandum Opinion of May 17, 1988 at 7 (Teitelbaum, J.). More precisely, Judge Smith found the scheme lasted from June 1981 to

June 1982. Memorandum Opinion of March 1, 1990 at 13 (Smith, J.). In fact plaintiffs testified that contacts with Upshur agents – the source of these actions – started about September 1981 and ended in June 1982, a ten month period. *Loughman v. Consol-Pennsylvania Coal Co.*, 740 F. Supp. 1114, 1120 (W.D. Pa. 1990).

All the evidence points to a short term operation. The Property Acquisition Agreement between Consol and Monongahela shows they anticipated needing Upshur for only 120 days. When all the property in the "Areas of Interest" were acquired, Upshur was to be discharged. The agreement shows no intent to acquire more land than originally contemplated. It specifically links the existing spur to all mines in the area and does not mention the need for more construction of spurs or taking of private property. When the defendants acquired all the property in the areas of interest, the fraud was complete. In short, defendants worked a single-scheme, single-victim (albeit a class of victims) operation that lasted one year at most.

Because "duration is the *sine qua non* of continuity" in a closed-ended scheme, the issue then is whether twelve months is a substantial period of time. *Hindes*, 937 F.2d at 873. In *Hindes* we hinted that one year is not a substantial period of time. *Id.* at 875 ("we will not hold that although eight months is not enough [to be a substantial period of time], a year is"). We hold that twelve months is not a substantial period of time.

We note that cases finding substantial period, including *H.J. Inc.*, dealt with fraudulent conduct lasting *years*, sometimes over a decade. Such findings of substantial time periods are consistent

with Congress' intent to combat "long-term criminal conduct." *H.J. Inc.*, 492 U.S. at 242. Recently, we noted that "[a]lthough RICO has not been limited to organized crime activity, we must not overlook that it was occasioned by Congress' perception of the danger posed by organized crime-type offenses, which are almost by definition continuing." *Hindes*, 937 F.2d at 874.

The time period of this case belongs with those of *Marshall-Silver* (seven months), *Banks* (eight months), *Kehr* (eight months), and *Hindes* (eight months). We therefore find no continuity under a closed-ended scheme. In *Hindes* we declined to set forth a "litmus test" to measure duration. *Id.* at 875. We still decline. We conclude only that there is no qualitative difference between eight and twelve months for the purposes of RICO continuity.

III. FRAUD UNDER PENNSYLVANIA LAW

A.

MONONGAHELA'S CONDEMNATION POWERS

Plaintiffs claimed that when seeking to acquire the railroad rights-of-way defendants fraudulently misrepresented, among other things, that Monongahela had power to condemn private property. The district court found this representation to be true, holding that as a matter of law Monongahela had eminent domain powers. It granted partial summary judgment for defendants as to that representation, but sent other alleged misrepresentations to the jury. Plaintiffs appeal this grant of partial summary judgment. We have plenary review and will affirm.

Plaintiffs asserts that Monongahela did not have eminent domain power for three reasons: (1)

because it lacked the Interstate Commerce Commission's (ICC) approval to construct the new track; (2) because there was no public use to justify condemnation; and (3) because the track was outside Monongahela's chartered area.

First, we disagree with plaintiffs as to their first reason. To begin, we note that ICC approval is required when a rail carrier seeks to construct, operate or acquire an additional line or extension. 49 U.S.C. § 10901(1). It, however, is *not* required when a rail carrier seeks to construct, operate, or acquire an intra-state *spur*. 49 U.S.C. § 10907(b)(1). Whether a track is a "spur" or "extension" is a mixed question of law and fact. *United States v. Idaho*, 298 U.S. 105, 109 (1936).

If the proposed track is designed to transport goods between different points of shipment or to invade the territory occupied by another railroad, that track is an extension. *See Texas & Pac. Ry. v. Gulf, Colo. & Santa Fe Ry.*, 270 U.S. 266, 278 (1926); *Nicholson v. ICC*, 711 F.2d 364, 368 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1056 (1984). If, however, the track is "designed and used for loading, unloading, switching, and other purposes connected with, and incidental to, but not actually and directly used for [transporting goods between two different points of shipment]," that tract is a spur and lies outside ICC jurisdiction. *Nicholson*, 711 F.2d at 367-368. Among other factors to be considered in determining whether it is a spur are the length of the addition; whether the proposed addition will serve only a single customer; and whether the carrier had been requested by the customer to provide service. *See Pennsylvania R.R. Co. v. Reading Co.*, 132 F. Supp. 616, 621-22 (E.D. Pa. 1958).

The district court correctly found that the proposed track was a spur. Though a track's designation itself does not determine its character (extension or spur), the track in question is sufficiently local to preclude ICC jurisdiction. *Nicholson*, 711 F.2d at 368, n.12. The track runs from the Bailey Mine in Grand Enon, Pennsylvania, to Waynesburg. It runs only 14.5 miles.[1] It is located wholly intra-state. It functions as a route to unload and transfer shipments from the Waynesburg line. It does not invade the territory of another railroad. Only Monongahela uses it. And it serves only Consol. In short, none of its features evokes "national concern." *Texas & Pacific*, 270 U.S. at 277. The district court was correct; ICC approval was unnecessary.

Second, we disagree with plaintiffs as to the second reason. Plaintiffs contend that Monongahela can only condemn for "public use." *See* U.S. Const. amends. V; Pa. Const., art. I, § 10; *Id.*, art. X, § 4. The proposed use, they contend, is private.

When determining what constitutes "public use," the Supreme Court defers to legislative decisions. *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 241 (1983) (Court will defer to legislative decision regarding public use unless that decision is unreasonable). That property is taken by eminent

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1. The landowners cite *Central of Georgia Railway*, 336 I.C.C. 623 (1970) for the proposition that a 14.5 mile track could not be a spur. In *Central of Georgia Railway*, the ICC concluded that a 14.45 mile track costing more than $3 million was an extension. The decision was based on the length of the track and the cost alone. We refuse to adopt this reasoning since, a track's designation depends on its use, not the length and cost alone.

domain and is transferred to a private party can still fall within the gambit of public use. This is so even when the motive for taking is to give to a private party. *Id.*, 467 U.S. at 243-44. Thus, under the United States Constitution "public use" is a broad concept.

Pennsylvania law is much the same. A condemning authority may only take for public use. The legislature may not grant the condemnor the right to take private property for private use. *See Philadelphia Clay Co. v. York Clay Co.*, 241 Pa. 305, 309-310, 88 A. 481, 482 (1913); *Borough of Big Run v. Shaw*, 16 Pa. Commw. 623, 626, 330 A.2d 315, 317 (1975). Notwithstanding, a taking retains its public character even when a portion of it benefits a private party. *In re Franklin Town Project-Philadelphia*, 19 Pa. Commw. 272, 280-81, 339 A.2d 885, 889, *cert. denied*, 423 U.S. 992 (1975). *See Dornan v. Philadelphia Hous. Auth.*, 331 Pa. 209, 200 A. 834 (1938).

In *Pioneer Coal Co. v. Cherrytree & Dixonville R.R.*, the Pennsylvania Supreme Court reasoned that public use should be broadly defined when the use benefits the Commonwealth. 272 Pa. 43, 116 A. 45 (1922). When defendant railroad condemned property to extend its track to reach a coal mine, the Court found public use because "the life, happiness and prosperity of the people of Pennsylvania depend to a very large degree upon getting the coal supply of the state out of the mines, on its way to the consumer." *Id.*, 272 Pa. at 52, 116 A. at 48. *See Philadelphia, Wilmington & Baltimore R.R. v. Williams*, 54 Pa. 103 (1867) (prosperity of city depended on transporting coal by rail).

Here, the district court found public use. We agree. The district court noted: "[Manor Reserve,] once at full production, will produce 3,000,000 tons of coal per year and will employ 350 people. The coal extracted from the mine has an average sulfur content of 1.7%, a low and desirable level that complies with emission standards generally applicable in the United States and Europe." Supp. App. at 115-116. The Manor Reserve mine and the track running to it benefit the Commonwealth's coal mining industry and the public. That the mine serves a private coal company does not diminish the public value. Constructing a spur will tap vital coal resource, provide fuel for the Commonwealth, create jobs, and better the environment.

Last, we disagree with plaintiffs as to their third reason. They contend that because the Manor track runs outside Monongahela's charter area Monongahela lacked the power to condemn property outside of its franchise without first obtaining a certificate from the Commonwealth's Public Utility Commission (PUC). *See* 66 Pa. Cons. Stat. Ann. § 1104.

We need not consider this contention in light of what happened at trial. Judge Teitelbaum instructed the jury that "[y]ou will reach the issue of damages only if you find that the plaintiffs have established all of the elements of *any* of their claims." Supp. App. 218. This instruction reflects the correct assumption that since plaintiffs had but one property each they could have suffered as a result of the misrepresentations only once, regardless of the number of misrepresentations committed. The jury found that fraud was committed and awarded damages to plaintiffs.

Thus even if this additional misrepresentation was made, it is irrelevant.

In sum, the district court properly granted partial summary judgment on plaintiffs' claim that Upshur agents misrepresented Monongahela's condemnation powers.

B.

JURY INSTRUCTIONS ON FRAUDULENT MISREPRESENTATION

The district court instructed the jury, "[i]f it is shown that a misrepresentation was made knowingly, then the misrepresentation need not be material." Supp. App. at 216. Defendants argue that when the district court gave this instruction it erred as a matter of law. We disagree and will affirm. Our review of this legal issue is plenary.

Under Pennsylvania law a fraud claim requires plaintiff to prov either a knowing misrepresentation or nonprivileged failure to disclose some existing fact. If, however, "the misrepresentation is innocently made, then it is actionable only if it relates to a matter material to the transaction involved." *Smith v. Renault*, 387 Pa. Super. 299, 305-06, 564 A.2d 188, 192 (1989) (quoting *Shane v. Hoffman*, 227 Pa. Super. 176, 181-82, 324 A.2d 532, 536 (1974)), *overruled on other grounds*, *Aiello v. Ed Saxe Real Estate, Inc.*, 508 Pa. 553, 560-61, 499 A.2d 282, 286 (1985). Thus, materiality becomes important only when the misrepresentation was innocently made or when it involved a privileged failure to disclose. The district court's instructions adequately reflected this distinction.

Even if we held all the misrepresentations were innocently made and materiality became a concern, the "error" is harmless. Upshur's misrepresentations were most material. The gross disparity between the prices obtained by the plaintiffs and those who knew of Consol's role (Closser, the Phillippis, and the Culps) bespeaks materiality. Moreover, while defendants correctly point out that Upshur had no duty to disclose Consol's role, they neglect to mention that Upshur agents affirmatively misrepresented that Monongahela was the *sole* principal. *See Chiarella v. United States*, 445 U.S. 222, 227-228 (1980). This representation constituted more than "mere silence"; it constituted active concealment. It amounted to common law fraud. *Renaut*, 387 Pa. Super. at 306, 564 A.2d at 192.

C.

JUSTIFIABLE RELIANCE ON TAX REPRESENTATIONS

The defendants moved for judgment n.o.v. as to the liability based on the representation of the tax free nature of the transactions. They claim there was insufficient evidence for the jury to conclude that plaintiffs justifiably relied on defendants' representation. Because they are not tax experts, defendants argue, plaintiffs should have independently investigated the tax matter. The district court denied the motion. We will affirm.

The same standard of review applies to this denial of a judgment n.o.v. as it did for the denial of the RICO judgment n.o.v., *supra*. *See Kinnel v. Mid-Atlantic Mausoleums, Inc.*, 850 F.2d 958, 961 (3d Cir. 1988).

Justifiable reliance on a misrepresentation is an element of common law fraud. *Klemow v. Time, Inc.*, 466 Pa. 189, 197 n.17, 352 A.2d 12, 16 n.17, *cert. denied*, 429 U.S. 828 (1976). Moreover, "[w]here the means of obtaining information are not equal the positive representations of the person who is supposed to possess superior means of information may be relied on." *Siskin v. Cohen*, 363 Pa. 580, 70 A.2d 293 (1950) (quotation omitted).

The Upshur agent *approached* plaintiff landowners, told them that he represented Monongahela, denied involvement of Consol, offered a purchase price, threaten plaintiffs that they would receive a lower fixed condemnation price if they refused to accept the agent's offer, and stated that part of the purchase price paid would be tax free. Upshur agents possessed superior access to information, initiated the sales of property, and presented themselves as land experts. Under these circumstances, the negotiating parties did not stand on equal footing and plaintiffs justifiably relied on the Upshur agent's statements concerning the tax consequences of a sale without making an independent investigation.

Justifiable reliance is even more evident in the cases where defendants' attorneys told plaintiffs of the tax free consequences of the sale. A lay person may justifiably rely on a lawyer's statement of fact or opinion of law though he knows the lawyer is representing a client whose interest is adverse to his own. Restatement (Second) of Torts, § 545, comment d.

IV. DAMAGES

A.

COMPENSATORY DAMAGE AWARD

Plaintiffs contend that the district court erred by granting a new damages trial. We agree and will reverse. We review for an abuse of discretion. *Semper v. Santos*, 845 F.2d 1233, 1236 (3d Cir. 1988).

Under Pennsylvania law, the measure of damages for a fraud claim is the actual loss that the fraud inflicts. *Savitz v. Weinstein*, 395 Pa. 173, 178 & n.2, 149 A.2d 110, 113 & n.2 (1959); *Peters v. Stroudsburg Trust Co.*, 348 Pa. 451, 35 A.2d 341, 343 (1944); *Delahanty v. First Pa. Bank, N.A.*, 318 Pa. Super. 90, 117-18, 464 A.2d 1243, 1257 (1983). Actual loss equals the fair market value of the property when sold minus the fraudulently paid price. *Stroudsburg Trust*, 348 Pa. at 454, 35 A.2d at 343; *Bishoff v. Valley Dairy Co.*, 302 Pa. 125, 153 A. 133 (1931).[2] The issue is whether the actual loss should be based on the properties' use as agricultural lands or the highest and best use as railroad rights-of-way.

At trial, plaintiffs' expert, Bodnar, testified that he valued the properties by assuming the highest and best use parameter: that is, value as a railroad right-of-way. To determine this value, he considered the selling prices of the Closser, Culp, and Phillippi parcels.

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2. The defendants claim that the landowners are only entitled to out-of-pocket losses rather than the benefit of the bargain. The cases cited, however, concern fraudulent misrepresentations *by* a seller *to* a purchaser. Here, we are faced with the converse situation.

The district court rejected Bodnar's testimony. Because it believed that the jury relied on Bodnar's testimony to compute the damages, the court rejected the jury award. It characterized Closser, the Culps, and Phillippis as "hold-outs." Since prices paid to hold-outs far exceed true market value, the court reasoned that Bodnar's valuations do not reflect the fair market value.

Under Pennsylvania law, a property owner can show her property's special and potential use as a railroad right-of-way when she faces condemnation. *See North Shore R.R. v. Pennsylvania Co.*, 251 Pa. 445, 96 A. 990 (1916); *Commonwealth Dep't of General Servs. v. Fake*, 45 Pa. Commw. 46, 405 A.2d 971 (1979). To prove highest and best use, a condemnee must show the land is adaptable to such use and a market need existed for such use at the time of the condemnation. *Fake*, 45 Pa. Commw. at 50-51, 405 A.2d at 974. *See United States v. 46,672.96 Acres of Land*, 521 F.2d 13, 15 (10th Cir. 1975).

Contrary to the district court's conclusions, Bodnar properly referred to the prices paid to the "hold-outs." A railroad right-of-way existed across many of the plaintiffs' properties long before Upshur agents approached them. The year before the Upshur agents offered to buy the property, Consol approached some plaintiffs to see if they were interested in selling. Thus plaintiffs' properties were adaptable for use as railroad rights-of-way and Bodnar properly calculated this potential into the value.

As to fair market value, the prices paid to the hold-outs reflect the market value. Consol needed each and every piece of property to construct their track. Though the district court correctly

characterized Closser, Culp and Phillippi as "hold-outs", it neglected to consider that plaintiffs would have demanded more money had they known what Closser, Culp and Phillippi knew – that Consol was involved and that Monongahela could not have condemned their properties for fixed prices. But for the defendants' scheme misrepresenting the circumstances surrounding Monongahela's property acquisitions, plaintiffs would have commanded higher prices. And these prices more accurately reflect fair market value. The district court abused its discretion by discounting Bodnar's testimony and setting aside the first damage award.

B.

PUNITIVE DAMAGE AWARD

The defendants contend that there was insufficient evidence to support the jury' award of punitive damages against some of the defendants. We disagree and will affirm.

"Fraud, alone, is not sufficient" to justify an award of punitive damages. *Golomb v. Korus*, 261 Pa. Super. 344, 348, 396 A.2d 430, 432 (1978). The conduct must be outrageous for a jury to award punitive damages. *Rizzo v. Haines*, 520 Pa. 484, 507, 555 A.2d 58, 69 (1989); *Pittsburgh Outdoor Adv. Co. v. Virginia Manor Apts., Inc.*, 436 Pa. 350, 353, 260 A.2d 801, 803 (1970). Where the defendants are agent and principal, the agent's conduct must be "clearly outrageous to justify the vicarious imposition of exemplary damages upon the principal." *Delahanty*, 318 Pa. Super. at 132, 464 A.2d at 1264 (quoting *Skeels v. Universal C.I.T. Credit Corp.*, 335 F.2d 846, 851-52 (3d Cir.

1964)). Plaintiffs must show outrageous conduct by a preponderance of the evidence. *See Martin v. Johns-Manville Corp.*, 508 Pa. 154, 494 A.2d 1088, 1098 (1985).

Plaintiffs clearly showed outrageous conduct. Upshur agent Boggs told the Hughes that they would have to be out of their house within two months though they had no interest in selling their property. He told the Headlees: "[Y]ou forget Consol. You are dealing with Mon railway system now." App. at 116A. When the Headlees expressed concern about the proximity of the track to their house and children, Boggs stated that if the right-of-way were condemned, the railroad could place the tracks within 10 feet of their home and is under no duty to fence the track or to otherwise provide for the safety of the Headlees' children. We hold that the jury could reasonably conclude that defendants acted outrageously when they obtained property by fraud, economic coercion, and thinly-veiled personal threats.

C.

DELAY DAMAGES AND PREJUDGMENT INTEREST

The district court awarded delay damages under Pa. R. Civ. P. 238. We have plenary review and will reverse. Rule 238 allows for interest on compensation awards arising from "bodily injury, death or property damage." Because this case involves lost profits the district court erred by allowing them.

As for prejudgment interest, the district court refused to award it. We agree and will affirm. When deciding whether to award prejudgment

interest to a party, a court must consider "whether countervailing equitable considerations militate against such a surcharge." *See American Mut. Liab. Ins. Co. v. Kosan*, 635 F. Supp. 341, 346 (W.D. Pa. 1986), *aff'd*, 817 F.2d 751 (3d Cir. 1987).

In *Arkla Exploration Co. v. Boren*, the court of appeals refused to award prejudgment interest where the plaintiff did not preserve the issue under Fed. R. Civ. P. 51 at the time the district court instructed the jury on the amount of damages to be entered should they choose to return a liability verdict. 411 F.2d 879, 883-884 (8th Cir. 1969).

Likewise plaintiffs failed to preserve the issue here. Plaintiffs first moved for prejudgment interest in June 1990, seven years after filing this action in federal court. This was too late. Plaintiffs explain this delay by noting that the district court awarded them delay damages under Pa. R. Civ. P. 238. Since *American Enka Co. v. Wicaco Mach. Corp.* prevents a party from obtaining *both* delay damages and prejudgment interest, plaintiffs argue that they were forced to rely on the court's award of delay damages and could not request prejudgment interest. 686 F.2d 1050, 1057 (3d Cir. 1982). This decision was imprudent. Plaintiffs should have moved for both remedies at the outset and let the court decide which to grant. We hold that plaintiffs' untimely request for prejudgment interest constitutes a countervailing equitable consideration militating against such a surcharge.

V. LEGAL MALPRACTICE

Plaintiff Dorothy Loughman claims that the district court erred when it granted Attorney Ewing

Pollock judgment n.o.v. on her legal malpractice action. We agree and will reverse.

To establish legal malpractice under Pennsylvania law, plaintiffs must show three elements: (1) employment of the attorney or other basis for a duty owed to the client; (2) failure of the attorney to exercise ordinary skill and knowledge; and (3) the attorney's negligence proximately caused damage to the client. *Rizzo*, 520 Pa. at 499, 555 A.2d at 65 (quoting *Schenkel v. Monheit*, 266 Pa. Super. 396, 405 A.2d 493, 494 (1977)). Viewing the evidence in a light most favorable to Loughman, we conclude that the evidence was sufficient to support a finding of legal malpractice.

Loughman owned 50.79 acres of land in the area of interest. An Upshur agent approached her and claimed that he represented Monongahela. He offered to purchase her property for $60,000. Loughman rejected the offer. The agent threatened that Monongahela would use its condemnation authority to take a 13 acre right-of-way for $1000 per acre. If Monongahela condemned the 13 acres, most of Loughman's property would be rendered inaccessible.

The same day Loughman telephoned her attorney Pollock. She had known Pollock for about forty-two years, and he had handled legal matters for her and her family. At that time Pollock was working for Monongahela, unbeknownst to Loughman. Loughman explained the situation, and Pollock told her not to worry because Monongahela would be fair. He also told her she did not need an attorney to negotiate with the Upshur agent.

Under these circumstances, we conclude sufficient evidence exists to find an attorney-client

relationship, lack of ordinary care, and proximate cause. When Loughman called Pollock, an attorney-client relationship was formed. She called him to seek his legal advice. He accepted this offer and readily gave advice. That Pollock previously represented her only furthers this conclusion. When Pollock told her that Monongahela would be fair without knowing what price had been offered, and when he failed to tell her Consol was involved and he represented Consol, Pollock failed to exercise ordinary skill and knowledge. Since Loughman testified that she agreed to sell only after she had consulted with Pollock, his advice and representations proximately caused her lost profits. Therefore the district court erred by failing to uphold the jury verdict on malpractice.[3]

VI. DISTRICT COURT'S REMARKS

Upshur agents contend the district court deprived them of a fair trial by calling them liars. Specifically, they complain about the district court's remarks that they "lied" if they represented

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3. The defendant attorneys argue that there is no evidence that Pollock fraudulently misrepresented Monongahela's condemnation powers to Dorothy Loughman, made any misrepresentations concerning the role of Consol or any other defendant in the transaction, or told her that a portion of the purchase price would be tax free.

Notwithstanding these arguments, the requisite minimum quantum of evidence supports the jury verdict against Attorney Pollock. Pollock told Loughman that Monongahela would treat her fairly without knowing the offered price for her parcel. Furthermore, he failed to disclose his representation of the defendants although he had a duty to do so. This evidence adequately supports a jury finding that Pollock committed fraud in his dealings with Loughman.

that property could be condemned for a fixed price. We disagree and will affirm.

In *American Home Assur. v. Sunshine Supermarket*, we stated:

> A federal judge is permitted to summarize and comment upon the evidence . . . . The court's comments, however, may not confuse or mislead the jury, or become so one-sided as to assume an advocate's position.

753 F.2d 321, 327 (3d Cir. 1985). Here, the district court merely characterized the great weight of the testimony and drew a correct conclusion. If the district court's comments confused or misled the jury, we still find no prejudicial error for the judge cured any error. He instructed the jury that only its decision counts and that it does not "have to be influenced" by anything he thinks or says.

VII. CONCLUSION

We conclude that the district court erred by setting aside the first damage award; the first award of punitive damages was adequately supported by the record; plaintiff landowners are not entitled to either prejudgment interest or delay damages; the district court properly granted judgment n.o.v. on the RICO claim since the continuity requirement was not satisfied; the Upshur agents' representation of Monongahela's condemnation power was a true statement; the district court properly instructed the jury as to the law of misrepresentation; the plaintiffs could have justifiably relied on the Upshur agents' statements concerning the tax free nature of the property transactions; the district court erred by granting judgment n.o.v. on landowner Loughman's legal

malpractice claim; and the district court's remark did not deprive defendants of a fair trial. We will vacate the second damage award and reinstate the first award returned by the jury.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Dated: December 20, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 90-3466, 90-3467, 90-3468, 90-3469,
90-3470, 90-3471, 90-3472, 90-3473, 90-3474,
90-3475, 90-3476, 90-3477, 90-3478, 90-3479,
90-3480, 90-3481, 90-3482, 90-3483, 90-3484,
90-3485, 90-3494, 90-3495, 90-3496, 90-3497,
90-3498, 90-3499, 90-3500, 90-3501, 90-3502,
90-3503, 90-3504, 90-3505, 90-3506, 90-3507,
90-3508, 90-3509, 90-3510, 90-3511, 90-3512,
90-3513,

JAMES E. HUGHES, ET AL,

Appellant

V.

CONSOL-PENNSYLVANIA COAL COMPANY,
ETC., ET AL

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT
OF PENNSYLVANIA
(D.C. Civil Action Nos. 83-00921, 83-01674,
83-01675, 83-01676, 83-01677, 83-01678,
83-01679, 83-01754)

Argued January 28, 1991

Before: SLOVITER, *Chief Judge*; NYGAARD, *Circuit Judge* and KATZ, *District Judge**

ORDER

The Opinion of the Court filed on the 20th day of September, 1991, is amended as reflected in the attached Opinion.

/s/ Richard L. Nygaard
Circuit Judge

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* Honorable Marvin Katz, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-3466

JAMES E. HUGHES and LINDA L. HUGHES,
Appellant

V.

CONSOL-PENNSYLVANIA COAL COMPANY, et al.

[OTHER CAPTIONS OMITTED]

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF PENNSYLVANIA
(D.C. Civil Action Nos. 83-00921,
83-01674, 83-01675, 83-01676, 83-01677
83-01678, 83-01679, 83-01754)

Present: Sloviter, Chief Judge, Nygaard,
Circuit Judge, and Katz, District Judge*

AMENDED JUDGMENT

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* Honorable Marvin Katz, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

These causes came on to be heard on the records from the United States District Court for the Western District of Pennsylvania and were argued by counsel January 28, 1991.

On consideration whereof, this Court hereby holds that the said District Court erred by setting aside the first damage award; the first award of punitive damages was adequately supported by the record; plaintiff landowners are not entitled to either prejudgment interest or delay damages; the district court properly granted judgment n.o.v. on the RICO claim since the continuity requirement was not satisfied; the Upshur agents' representation of Monongahela's condemnation power was a true statement; the district court properly instructed the jury as to the law of

misrepresentation; the plaintiffs could have justifiably relied on the Upshur agents' statements concerning the tax free nature of the property transactions; the district erred by granting judgment n.o.v. on landowner Loughman's legal malpractice claim; and the district court's remark did not deprive defendants of a fair trial. Accordingly, it is now here ordered and adjudged that the judgments of the said District Court appealed here are vacated as to the second damage award and the causes are remanded to the said District Court with instruction to reinstate the first awards returned by the jury. All of the above in accordance with the opinion of this Court.

ATTEST:

CLERK

Dated: December 20, 1991

Dated: December 20, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 90-3466, 90-3467, 90-3468, 90-3469,
90-3470, 90-3471, 90-3472, 90-3473, 90-3474,
90-3475, 90-3476, 90-3477, 90-3478, 90-3479,
90-3480, 90-3481, 90-3482, 90-3483, 90-3484,
90-3485, 90-3494, 90-3495, 90-3496, 90-3497,
90-3498, 90-3499, 90-3500, 90-3501, 90-3502,
90-3503, 90-3504, 90-3505, 90-3506, 90-3507,
90-3508, 90-3509, 90-3510, 90-3511, 90-3512,
90-3513,

JAMES E. HUGHES, ET AL,

Appellant

V.

CONSOL-PENNSYLVANIA COAL COMPANY,
ETC., ET AL

BEFORE: SLOVITER, *Chief Judge*, NYGAARD,
Circuit Judge and KATZ, *District Judge**

SUR PETITION FOR REHEARING

The petition for panel rehearing filed by appellants/cross-appellees in the above-entitled

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* Honorable Marvin Katz, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

case having been submitted to the judges who participated in the decision of this court and no judge who concurred in the decision having asked for rehearing, the petition for panel rehearing is denied, but the opinion is amended as reflected in the attached.

By the Court,

/s/ Richard L. Nygaard
Circuit Judge

Dated: December 20, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DOROTHY LOUGHMAN, et al.,

Plaintiffs,

v.

CONSOL-PENNSYLVANIA COAL CO., et al.,

Defendants.

Civil Action Nos. 83-921, 83-1674, 83-1675, 83-1676, 83-1677, 83-1678, 83-1679, & 83-1754.

MEMORANDUM ORDER

This court conducted a new trial in these consolidated cases, on damages only, in March, 1990. The parties have filed various post-trial motions, which we address here seriatim. As a preliminary matter, however, plaintiffs have moved to strike defendants' post-trial motions as exceeding the

scope of the retrial or for having been waived by defendants. We have addressed only motions relevant to the second trial. In that regard, we find that defendants adequately have preserved these points at trial, with one exception noted below. The motion to strike is denied.

I. Defendants' Motions for JNOV and New Trial

Defendants Consol Pennsylvania Coal Company, Consolidation Coal Company, Consol Land Development Company, The Monongahela Railway Company, Rheinbraun U.S. Corporation, Rheinische Braunkohlenwerke A.G., and Marie Theresa Bergbaugesellschaft MBH (the "Coal Company defendants") move for a judgment notwithstanding the verdict on grounds that plaintiffs introduced

insufficient evidence at trial to support a finding of any damages, compensatory or punitive. The standard for evaluating a judgment notwithstanding the verdict is whether the evidence and justifiable inferences most favorable to the prevailing party afford any rational basis for the verdict. Bhaya v. Westinghouse Elec. Corp., 832 F.2d 258, 259 (3d Cir.1987) cert. denied, 109 S.Ct. 782 (1989). Where the evidence is contradictory, a judgment notwithstanding the verdict is inappropriate. Bonjorno v. Kaiser Aluminum & Chemical Corp., 752 F.2d 802 (3d Cir. 1984), cert. denied, 477 U.S. 908 (1986).*

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* The Third Circuit has explained the JNOV standard as follows:

> [S]ince the credibility of witnesses is peculiarly for the jury, it is an invasion

Footnote cont'd. on next page

In these cases, plaintiffs presented expert testimony concerning the fair market value of their properties which would support the jury's

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Footnote cont'd. from preceding page

> of the jury's province to grant a new trial merely because the evidence was sharply in conflict. The trial judge, exercising a mature judicial discretion, should view the verdict in the overall setting of the trial; consider the character of the evidence and the complexity or simplicity of the legal principles which the jury was bound to apply to the facts, and abstain from interfering with the verdict unless it is quite clear that the jury has reached a seriously erroneous result. The judge's duty is essentially to see that there is no miscarriage of justice. If convinced that there has been, then it is his duty to set the verdict aside; otherwise not.

Lind v. Schenley Industries, Inc., 278 F.2d 79, 89 (3d Cir.), cert. denied, 364 U.S. 835 (1960).

verdict. Therefore, we deny the motion for JNOV.

The Coal Company defendants also seek a new trial on several grounds. First, defendants claim that the amount of damages set by the jury is so excessive as to warrant a remittitur or, in the alternative, a new trial. An order directing plaintiffs to remit a portion of the verdict in excess of the maximum amount supportable by the evidence or, if remittitur is refused, to submit to a new trial is the proper procedure in situations where no clear judicial error or "pernicious influence" can be identified but where the verdict is so large as to shock the conscience of the court. Kazan v. Wolinski, 721 F.2d 911, 914 (3d Cir. 1983). In light of the evidence presented at trial, we cannot say the size of the verdict here is shocking.

Next, defendants allege that certain evidentiary errors by this court necessitate a new trial. In particular, defendants attack the court's decision to admit into evidence the testimony of plaintiffs' real estate experts and the testimony of David Hook, an attorney involved in negotiations with defendants on behalf of some other property sellers, not plaintiffs. We already have addressed the admissibility of plaintiffs' experts' testimony by denying defendants' motions in limine. See Loughman v. Consol. Pa. Coal Co., et al, No. 83-921, slip op. at 7-9 (W.D. Pa. January 31, 1990). We reiterate only that the Federal Rules of Evidence establish a liberal policy of permitting expert testimony. In that defendants did not challenge the qualifications of plaintiffs' experts and had ample oppor-

tunity to introduce their own experts on the issue of fair market value, we see no error in our decision to admit the testimony of plaintiffs' experts.

Likewise, we see no error in allowing David Hook to testify about certain conduct of defendants which was consistent with or similar to the conduct of defendants vis-a-vis the plaintiffs in this case, such information being relevant to plaintiffs' fraud claims. Testimony by Mr. Hook outside the scope of similar or consistent conduct was merely cumulative in nature and created no prejudice to defendants.

Defendants allege that plaintiffs' counsel's closing argument was so inflammatory as to support the need for a new trial. In that regard, defendants allege that counsel made references to evidence not of record, that he made inappropriate references to some of

defendants' nationalities, and that he improperly argued the finding of liability by the previous jury. After plaintiffs' counsel's closing and upon objections of defendants, this court delivered a curative instruction to the jury.

A new trial may be ordered where counsel engages in improper conduct having a prejudicial effect on the jury. Whether there is prejudice depends on whether there is a reasonable probability that the jury's verdict was influenced by the conduct in question. Northeast Women's Center, Inc. v. McMonagle, 689 F.Supp. 465, 471 (E.D. Pa. 1988), aff'd in relevant part, remanded on other grounds, 868 F.2d 1342 (3d Cir. 1989). In light of the curative instruction delivered to the jury, we find no reasonable probability that the jury was influenced improperly by counsel's comments.

Defendants have challenged the sufficiency of the jury charge, complaining that it lacked an appropriate instruction concerning nominal damages and vicarious liability and alleging that it was generally confusing to the jury. As for the lack of an instruction on nominal damages, there was never a request concerning such a charge and therefore we find any objection now to its absence to be untimely. Concerning the jury instruction on agency and vicarious liability, the court included sufficiently clear instructions on these legal issues and we find defendants suffered no prejudice on this point. Finally, we detected no confusion generally on the jury's part, nor did counsel complain that the charge was potentially confusing, even though counsel were presented with a copy of the charge well

before it was delivered orally to the jury.

Finally, defendants have raised two due process arguments in support of their new trial motion. First, they complain that with regard to the claims for punitive damages the retrial improperly bifurcated the liability and amount of damages issues. At the first trial, the jury found by special interrogatory that defendants' conduct was outrageous, and that defendants were liable for punitives. Because a RICO claim remained in the case at that time, Judge Teitelbaum's order vacating the damage amounts did not expressly address punitives, the Court having determined that the treble damage provision of RICO precluded the punitives. At the time of retrial, the RICO claims having been dismissed by our Order of March 1, 1990, we determined

that Judge Teitelbaum's Order directing that the first jury's calculation of damages was excessive required a retrial of all damages issues. We see no error in retrying the amount of punitives again, and in particular, we find that no prejudice to defendants resulted since the collective sum of punitives assessed at the second trial represented more than a four million dollar reduction from the amount assessed at the first trial.

Defendants' second due process argument is that Pennsylvania law provides insufficient guidance to juries in calculating punitive damage awards. We do not recollect defendants previously raising this objection, either in formal motions or in the conferences concerning the jury instructions. Although defendants have not expounded on the legal

basis for this argument in the form of a memorandum or in the motion itself, we presume that defendants are in effect challenging the Pennsylvania Supreme Court's recent holding that the amount of punitive damages need not bear a reasonable relationship to compensatory damages awarded in a particular case. Kirkbride v. Lisbon Contractors, Inc., 521 Pa. 97, 555 A.2d 800 (1989). Kirkbride may have eliminated one standard for evaluating punitive damages; however, we find that juries in Pennsylvania still have sufficient guidelines by which to calculate the amount of punitive damages to be assessed, if any. The relevant factors, set forth in the Restatement of Torts (Second), have been adopted by the Pennsylvania courts and were included in this court's jury instructions in the instant cases:

> In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to plaintiff that the defendant caused or intended to cause and the wealth of the defendant.

Restatement (Second) of Torts §908(2)(1979). Accord Kirkbride, 521 Pa. at 100, 555 A.2d at 802; Chuy v. Phil. Eagles Football Club, 595 F.2d 1265, 1277 (3d Cir. 1979). Where the amount of punitive damages is so disproportionate in light of these factors that it shocks the court's sense of justice, the court may, in its discretion, remit the damages to a more reasonable amount. Kirkbride, 521 Pa. at 104, 555 A.2d at 803-04.

In light of the circumstances in the trial of these cases, we find that defendants' due process rights were adequately protected.

For the foregoing reasons, the post-trial motions filed by the Coal Company defendants are denied.

Defendants Ewing Pollock, Pollock Pollock & Thomas, the Upshur Agency, Inc., David Boggs, Mike Wilson and William Reese have also filed post-trial motions for judgment notwithstanding the verdict and for a new trial. These motions present us with nothing substantially different from the arguments made by the coal company defendants; therefore, we also will deny the other defendants' motions for JNOV and for a new trial.

II. Plaintiffs' Motion to Impose Prejudgment Interest and To Impose Delay Damages

Plaintiffs have requested both statutory delay damages and common law prejudgment interest. The result of granting both kinds of interest would be duplication of damages, which Pennsylvania law prohibits. Dean Witter Reynolds, Inc. v. Genteel, 346 Pa. Super. 336, 499 A.2d 637 (1985), allocatur denied, 514 Pa. 635, 522 A.2d 1105 (1987) and 514 Pa. 639, 523 A.2d 346 (1987); American Enka Co. v. Wicaco Mach. Corp., 686 F.2d 1050, 1057 (3d Cir. 1982). Whether plaintiffs are entitled to one or the other type of interest is discussed below.

A. Delay Damages

Plaintiffs seek delay damages under Rule 238 of the Pennsylvania Rules of Civil Procedure. Contrary to plaintiffs' interpretation of the record, this Court has not ruled on this issue previously. In addressing the post-trial motions from the first trial, Judge Teitelbaum held that delay damages were appropriate. Loughman v. Consol Pa. Coal Co. et al., No. 83-921 slip op. at 4 (W.D. Pa. October 22, 1987). Our analysis of the case law leads us to the opposite conclusion and we will deny plaintiffs' motion for delay damages.

Rule 238 provides for mandatory interest on compensatory damage awards arising from bodily injury, death or property damage, which interest is to be calculated from the date of the complaint. Plaintiffs' damages do not

arise from bodily injury, death or property damage. These cases do not present the kind of damage to tangible property anticipated by Rule 238. They arise from fraud in the making of contracts. We find them to be tort cases and similar to an action for tortious interference with a contract in that they allege lost profits from the sale of property. Rule 238 does not apply to cases involving lost profits or income. Butler v. Flo-Ron Vending Co., 383 Pa. Super. 633, 655, 557 A.2d 730, 741 (1989), allocatur denied, _____ Pa. _____, 567 A.2d 650 (1989); Temporaries Inc. v. Krane, 325 Pa. Super. 103, 115, 472 A.2d 668, 674 (1984); Contractor Utility Sales Cos. v. Certain-Teed Corp., 748 F.2d 1151, 1157 (7th Cir. 1984) (applying Pennsylvania law) (Dumbauld, J.), cert. denied, 470 U.S. 1029 (1985). Plaintiffs' motion for delay damages is denied.

B. Prejudgment Interest

Plaintiffs also seek common law prejudgment interest.

> Common law pre-judgment interest is based on the principle of compensation and the understanding that a plaintiff wrongfully deprived of a sum of money is not made whole unless the delay in recovery is accounted for.
>
> * * *
>
> . . . in Pennsylvania common law damages for delay are recoverable in tort actions when the amount is liquidated or capable of mathematical ascertainment.

American Enka Co. v. Wicaco Mach. Corp., 686 F.2d at 1056, 1057. Prejudgment interest could be appropriate in these cases because the amount of plaintiffs' damage was ascertainable by reference to the fair market value of the properties sold.

The decision to award damages in delay and the rate of interest is in the discretion of the trial court. Sack v. Feinman, 495 Pa. 100, 432 A.2d 971 (1981); Ambromovage v. United Mine Workers of America, 726 F.2d 972, 981 (3d Cir. 1984). Accord Levy v. First Pennsylvania Bank, N.A., 338 Pa. Super. 73, 84, 487 A.2d 857, 863 (1985).* There are four factors to consider when contemplating an award of prejudgment interest:

1) whether the claimant has been less than diligent in prosecuting the action;

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* Contrary to defendants' position that only the jury can grant prejudgment interest, we are satisfied that the trial court may mold the verdict to include it. Verner v. Shaffer, 347 Pa. Super. 206, 211, 500 A.2d 479, 482 (1985).

2) whether the defendant has been unjustly enriched;

3) whether an award would be compensatory; and

4) whether countervailing equitable considerations militate against such a surcharge.

American Mut. Liability Ins. Co. v. Kosan, 635 F.Supp. 341, 346 (W.D. Pa. 1986) (Weber, J.), aff'd w/o op., 817 F. 2d 751 (3d Cir. 1987); Pension Benefit Guaranty Corp. v. Greene, 570 F. Supp. 1483, 1503 (W.D. Pa. 1983), aff'd w/o op., 727 F.2d 1100 (3d Cir.), cert. denied, 469 U.S. 820 (1984).

Plaintiffs have been diligent in pressing their claims, having filed them within a year of the last land transaction in question. Given both juries' determinations concerning liability and damages, the second and third factors favor a grant of prejudgment interest.

With respect to the fourth factor, defendants have raised the issue of waiver by contending that plaintiffs did not seek common law prejudgment interest prior to the post-trial motion stage of this litigation. Our review of the record indicates that plaintiffs did not seek common law prejudgment interest in their complaints (including original and amended complaints), in their pre-trial calculations of damages or even in their post-trial motions filed after the first trial in 1985.*

Having failed to preserve this issue during seven years of litigation, we find that plaintiffs' request for

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* Plaintiffs sought Rule 238 delay damages after the first trial, which request was originally denied but then was granted upon reconsideration.

prejudgment interest at this juncture is untimely. Arkla Exploration Co. v. Boren, 411 F.2d 879, 883-84 (8th Cir. 1969) (no entitlement to prejudgment interest where plaintiff did not preserve issue). The equities clearly militate against granting interest, and plaintiffs' motion for common law prejudgment interest is denied.

For the foregoing reasons, all post-trial motions filed by defendants and plaintiffs are denied.

BY THE COURT,

/s/ D. Brooks Smith
D. Brooks Smith
United States District Judge

DATE: June 18, 1990

cc: All Counsel of Record

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 83-921

DOROTHY LOUGHMAN, Plaintiff,

V.

CONSOL-PENNSYLVANIA COAL CO., et al., Defendants.

[OTHER CAPTIONS OMITTED]

MEMORANDUM OPINION

Judgment previously was entered in favor of plaintiffs and against defendants in each of the above-captioned cases after completion of a jury trial.

Several motions presently are before the Court.

All defendants have filed motions for judgment notwithstanding the verdict (JNOV) or, in the alternative, for a new trial. JNOV will be granted

for all defendants with respect to the claims that they violated 18 U.S.C. §§ 1962(c) and (d). JNOV will not be granted, however, with respect to the claims for common law fraud and conspiracy to defraud. In addition, because the Court finds that the damages awarded to plaintiffs are obscenely excessive and contrary to the great weight of the evidence concerning damages, unless plaintiffs agree to a remittitur defendants will be granted a new trial limited to the issue of damages to be awarded to plaintiffs.

This Court previously had denied plaintiffs' motion for an award of delay damages pursuant to Pa.R.C.P. 238, 42 Pa.C.S.A. (Purdon's 1987). Plaintiffs have filed a motion for reconsideration. The Court has reconsidered and now finds that plaintiffs are entitled to delay

damages. In the event that plaintiffs do agree to a remittitur, delay damages are to be included in that amount.

Defendants have argued that Civil Action No. 83-1754 should be dismissed because the plaintiffs named therein - Carolyn Schultz, Coleen Abel, and Beth Meighen - are not the real parties in interest in that case. Defendants are correct in maintaining that these individuals are not the real parties in interest. Even so, Civil Action No. 83-1754 will not be dismissed. Rather, plaintiffs will be given ninety (90) days in which to substitute the real party in interest.

Defendant Upshur Agency, Inc. has filed a motion to compel plaintiffs to satisfy any judgment against it. The motion will be denied.

Finally, plaintiffs have petitioned for an award of attorney's

fees, costs, and expenses. The motion will be denied in light of the granting of JNOV for the defendants with respect to 18 U.S.C. §§ 1962(c) and (d).

I.

The standard to be applied when considering a motion for JNOV is a familiar one. Such a motion may be granted only when, without considering the credibility of the evidence, there can be but one reasonable conclusion as to the proper judgment. JNOV may not be granted, however, when there is conflicting evidence, or even insufficient evidence, to conclusively establish the movant's case. See 5A J. Moore and J. Desha Lucas, Moore's Federal Practice ¶ 50.07[2] (2d ed. 1986).

Plaintiffs claimed, among other things, that defendants had violated 18 U.S.C. §§ 1962(c) and (d).

18 U.S.C. § 1962(c) provides that :

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity ....

Proof of a violation of 18 U.S.C. § 1962(c) requires a showing of (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. See Sedima S.P.L.R. v. Imrex Co., ____ U.S. _____, 87 L.Ed.2d 346, 358-59 (1985).

18 U.S.C. § 1961(1) defines "racketeering activity" as including a long list of specified state and federal criminal offenses, including mail fraud

(18 U.S.C. § 1341) and wire fraud (18 U.S.C. § 1343).

A "pattern" of racketeering activity is defined at 18 U.S.C. § 1961(5) as requiring "at least two acts of racketeering activity" within a specified period of time. Beyond this, however, the statute itself says nothing concerning whether anything further is required for a "pattern" of rackeeting activity.

Although certain comments in Sedima unquestionably are dicta, they very strongly suggest that something more than just two racketeering acts is required for a "pattern" of racketeering activity for purposes of RICO. The Court noted that the above definition of "pattern":

> requires at least two acts of racketeering activity...not that it "means" two such acts. The implication is that while two such acts are necessary,

> they may not be sufficient. Indeed, in common parlance two of anything do not generally form a pattern.

Sedima, _____ U.S. at _____, n. 14, 87 L.Ed.2d at 358, n. 14.

The Court then considered the legislative history of RICO to ascertain what else is required for a "pattern" of racketeering activity:

> The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate Report explained: "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern." S.Rep.No. 91-617, p. 158 (1969) (emphasis added). Similarly, the sponsor of the Senate bill, after quoting this portion of the Report, pointed out to his colleagues that "[t]he term 'pattern' requires the showing of a relationship... So, therefore, proof of two acts

> of racketeering activity, without more, does not establish a pattern...." 116 Cong.Rec. 18940 (1970) (Statement of Sen. McClellan). See also id., at 35193 (statement of Rep. Poff) (RICO "not aimed at the isolated offender"); House Hearings, at 665.

Sedima, _____ U.S. at ____, n. 14, 87 L.Ed.2d at 358-359, n. 14.

Finally, the Court looked to another provision of the same bill for further illumination:

> Significantly, in defining "pattern" in a later provision of the same, bill Congress was more enlightening: "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 18 U.S.C. § 3575(e). This language may be useful in interpreting other sections of the Act.
> Cf. Ianelli v. United States, 420 U.S. 770, 789, 95 S.Ct. 1284, 1295, 43 L.Ed.2d 616 (1975).

Many courts that have been confronted with questions concerning whether more than just two predicate acts are required for a "pattern" of racketeering activity have capitalized on the above remarks in Sedima that proof of a "pattern" also requires a showing that the racketeering acts were continuous and related. See, e.g., Superior Oil Co. v. Fulmer, 785 F.2d 252, 257 (8th Cir. 1986); also Torwest DBC, Inc. v. Dick, 810 F.2d 925, 928 (10th Cir. 1987).

Unfortunately (and not surprisingly), Sedima does not indicate how this additional requirement of "continuity plus relationship" is to be understood. In particular, the continuity requirement has caused considerable difficulty. Those courts that have attempted to capitalize on the remarks in Sedima are in general

agreement that a plaintiff must demonstrate some facts from which at least the threat of "ongoing illegal conduct" may be inferred. A scheme to achieve a single, discrete objective, without more, does not create a threat of ongoing activity because the scheme will terminate when that objective has been achieved. See Towest DBC, 810 F.2d at 928-929.* Put another way, a scheme must be "open-ended" in some demonstrable way - e.g., in time, or in those whom it will victimize, or in the means employed to further the objectives of the scheme - in order for it to be continuous.

JNOV will be granted for all defendants and against all plaintiffs

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* But see United States v. Ianello, 808 F.2d 184, 189-193 (2d Cir. 1986) for a contrary view.

with respect to 18 U.S.C. § 1962(c) because plaintiffs failed to offer any proof from which it reasonably could be inferred that defendants engaged in a "pattern" of racketeering activity for RICO purposes, as that term just has been construed. More precisely, plaintiffs have not offered any evidence which could be taken as showing that the alleged scheme in which defendants were engaged was continuous - i.e, ongoing.

The evidence presented by plaintiffs at most showed only that the so-called "scheme" of the defendants had but a single, discrete objective -- namely, to purchase the right-of-way needed to build a rail line. Such a scheme was not open-ended. It had a discrete temporal ending-point. The scheme was completed and came to an end once the necessary properties were acquired. The scheme also was self-

limiting in its scope. It involved only a discrete number of properties necessary to complete the right-of-way. Such self-imposed limitations were inherent to the scheme as depicted by plaintiffs.

II.

As was noted previously, plaintiffs also claimed that defendants had violated 18 U.S.C. § 1962(d), which provides that:

> It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

The object of a RICO conspiracy must be to violate a substantive RICO provision. See United States v. Hampton, 786 F.2d 977, 978 (10th Cir. 1986). Proof that a defendant violated 18 U.S.C. § 1962(d) by conspiring to violate 18 U.S.C. §

1962(c) requires more than proof that the defendant merely conspired to commit the predicate offenses necessary to establish a "pattern." Rather, it must be shown that the defendant conspired to "participate...in the conduct of such enterprise's affairs through a pattern of racketeering activity." United States v. Elliott, 571 F.2d 880, 903 (5th Cir. 1978); also Medallion TV Enterprises v. SELECTV, Inc., 627 F. Supp. 1290, 1301 (C.D. Cal. 1986).

Not only did plaintiffs fail to produce evidence which could support the inference that defendants engaged in a "pattern" of racketeering activity, they also failed to produce evidence which could support the inference that defendants conspired to participate in the conduct of the affairs of an enterprise through a pattern of racketeering activity. JNOV therefore

also will be granted for all defendants and against all plaintiffs with respect to 18 U.S.C. § 1962(d).

JNOV will not, however, be granted with respect to plaintiffs' remaining claims that defendants committed common law fraud and conspired to commit common law fraud. There is evidence which could support these claims.

The overwhelming evidence indicates that plaintiffs' properties were worth far less than those values awarded by the jury. For example, the jury awarded the Hughes' (Civil Action No. 876-1678) $122,000 in damages, even though they had purchased that same property some four years earlier for a mere $9,500. Dorothy Loughman (Civil Action No. 83-921) had sold ten acres of her property for only $800 per acre approximately six years prior to the

sale of another portion of the same property to defendants. The jury, however, awarded her damages amounting to approximately $100,000 per acre for the portion of her property she sold to defendants. The Yesenoskys had listed their property as being for sale in 1980 for $40,000. The jury awarded the Yesenoskys $435,000 in damages for the sale of their property to defendants less than two years later.

The problem is not confined only to the damages awarded to these particular plaintiffs. As was pointed out, the jury obviously relied heavily on the testimony of Mr. Bodnar, who explained on cross-examination that his figures were based largely on the prices paid to three (out of some fifty) landowners who were the last to sell their properties for the railroad right-of-way: Grover Phillipi ($146,670 per

acre); John Culp ($75,216 per acre); and Sarah Closser ($240,108 per acre). All other sales, except for these three, were ignored by Mr. Bodnar in ascertaining the fair market value of plaintiffs' properties.

III.

A new trial may be ordered should the trial court find that the damages awarded by the jury are grossly excessive. See 6A J. Desha Lucas, Moore's Federal Practice ¶ 59.08[6] (3d ed. 1987).

The jury awarded the following compensatory damages: to Dorothy Loughman (Civil Action No. 83-921) it awarded $1,450,000; to John and Linda Yesonosky (Civil Action No. 83-1674) it awarded $435,000; to Paul and Mabel Kent (Civil Action No. 83-1675) it awarded $747,500; to James and Glenna McIntyre

(Civil Action 83-1676) it awarded $48,000; to Morris Levine Enterprises it awarded $775,000 and to Levine Iron and Metal (Civil Action No. 83-1677) it awarded $438,000; to James and Linda Hughes (Civil Action No. 83-1678) it awarded $122,000; to Mark and Charlotte Headlee (Civil Action No. 83-1679) it awarded $895,000; and to Carolyn Schultz, Colleen Abel, and Beth Meighen, the heirs of John T. Throckmorton (Civil Action No. 83-1754), it awarded $450,000. Such damages are obscenely excessive and are against the great weight of the evidence concerning damages.

For all practical purposes, the sole evidence concerning the fair market values of plaintiffs' properties came from Mr. Gary Bodnar, plaintiffs' expert witness. A comparison of the damages awarded with those figures

propounded by Mr. Bodnar leaves one with the inescapable impression that the jury relied almost entirely on his testimony in determining damages.

It defies reason to infer that these three sales, all of them by "hold-outs", are indicative in any way of the fair market values of the properties of those who were among the earliest to sell. It is far more reasonable to infer that the prices paid to Phillipi, Culp, and Closser for their properties were far in excess of their true market values - because the defendants were operating under severe time constraints - than it is to infer that the fair market values of plaintiffs' properties can be based on the prices paid to Phillipi, Culp, and Closser.

A court is not required to order a new trial when it finds that the damages awarded are excessive and

shocking to its conscience. The court instead may use the remittitur device, whereby it may refuse to order a new trial on condition that plaintiffs agree to remit a specified amount. 6A J. Desha Lucas, Moore's Federal Practice ¶ 59.08[7] (3d ed. 1987).

Remittitur is appropriate in this case in light of the fact that a new trial, even though it would be limited only to the issue of damages, in all likelihood would consume the time of both the court and all parties. It is not possible, however, for the Court to state with any degree of exactitude what would be an appropriate amount for plaintiffs to remit. The inability of the Court to state precisely what amounts should be remitted poses no obstacle here, however. The parties hereby are directed to seek an accommodation as to the damages to be

remitted in each case. Should the parties be unable to reach an accommodation within ninety (90) days, a new trial limited only to the issue of damages will be ordered. See Zavala v. Citicorp Services, 426 F.Supp. 241, 244 (S.D.N.Y. 1976).*

IV.

Civil Action No. 83-1754 was commenced by Carolyn Schultz, Colleen Abel, and Beth Meighen in their own names (and as the heirs of John T. Throckmorton) after the death of Mr.

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* Were the Court able to state with any precision what amount should be remitted by plaintiffs, it then would increase the remainder by adding delay damages, pursuant to Pa.R.C.P., 42 Pa.C.S.A. Delay damages should be included in the remittitur agreed to by the parties, in the event that they are able to agree to a remitted amount.

Throckmorton and after the appointment of his personal representative.

Every action must be prosecuted in the name of the real party in interest. Fed.R.Civ.P. 17(a). Plaintiffs Schultz, Abel, and Neighen are not the real parties in interest in Civil Action No. 83-1754 and thus are not entitled to bring the action in their own names. 20 Pa.C.S.A. § 3373 (Purdon's 1975) provides that such actions may be "brought by...[the decedent's] representative along." Any action which survives a decedent must be initiated by (or against) the decedent's personal representative. See D'Orazio v. Locust Lake Village, 406 A.2d 550, 551 (Pa.Super. 1979).

The action at Civil Action No. 83-1754 will not be dismissed at this time, even though it has not been brought by the real party in interest.

Rather, plaintiffs will be given ninety (90) days in which to substitute John T. Throckmorton's personal representative as the plaintiff in that action. See Fed.R.Civ.P. 17(a).

V.

Defendant Upshur Agency, inc. filed for reorganization under Chapter 11 of the Bankruptcy Code. An automatic stay went into effect on June 13, 1985. An order was issued by the Bankruptcy Court for the Northern District of West Virginia the day before trial in these actions was to begin. The Order granted plaintiffs relief from the stay in order to permit plaintiffs to proceed to a determination of liability of Upshur Agency, Inc. The order further provided that:

> ...any recovery against the debtor shall be limited to insurance proceeds and no recovery shall be made against

> the debtor's estate without further order of this Court.

Defendant Upshur's Motion To Compel Plaintiffs To Satisfy Judgment Against The Upshur Agency, Inc. will be denied. Although the word "recovery" is not defined, the fair import of the above order is that it refers to payment. Thus, the effect of the Order is that notwithstanding Upshur's bankruptcy, any final judgment in favor of plaintiffs and against Upshur may be paid out of any available insurance proceeds, and that any further payment would, like the claims of any other creditor, be subject to further proceedings in Bankruptcy Court.

Upshur's contention that the judgments should be satisfied because there in fact are no insurance proceeds available in light of the jury verdict is a question to be adjudicated in

execution proceedings or in a declaratory judgment action, not in a motion to satisfy judgment.

VI.

Finally, plaintiffs have petitioned for an award of attorney's fees, costs, and expenses for prevailing under RICO.

18 U.S.C. § 1964(c) provides in relevant part that:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter...shall recover...a reasonable attorney's fee.

Plaintiffs' petition must be denied in light of the granting of JNOV for defendants with regard to the claims that they violated 18 U.S.C. §§ 1962(c) and (d).

An appropriate order will be issued.

Dated: October 22, 1987.

/s/ Hubert I. Teitelbaum

Hubert I. Teitelbaum
United States District Judge

EXTRACT FROM JUDGE SMITH'S
CHARGE TO THE JURY OF APRIL 2, 1990.
TRANSCRIPT 3127-3131

While you will determine the fair market value in one lump sum amount as to all defendants, you should return a separate verdict as to punitive damages, if any, against each of the defendants because you have to consider factors which differ as to each defendant.

With respect to Defendants Consol Pennsylvania Coal Company and Consolidation Coal Company, Consol Land Development, the Monongahela Railway Company, Pollock, Pollock and Thomas, David Boggs and the Upshur Agency, it has been determined in an earlier proceeding that these defendants' conduct toward all of the plaintiffs was outrageous.

Contrary to a statement made during closing argument, no determination was made during the previous proceeding concerning punitive damages. The previous proceeding merely made these findings relative to outrageous conduct. It will be for you to determine whether or not punitive damages should be awarded.

It was also determined at that time that Ewing Pollock's conduct toward Dorothy Loughman was outrageous, and that Mike Wilson's conduct toward James McIntyre and Glenna McIntyre was outrageous.

Punitive damages may be, but need not be, awarded by you for the purpose of punishing defendants for their conduct and to deter the defendants and others similarly situated from similar conduct in the future.

In determining whether to award punitive damages, you are instructed to consider only the conduct that has previously been determined as outrageous. That is, in the case of Defendant Ewing Pollack, you may only consider his conduct toward Dorothy Loughman. In the case of Mike Wilson, you may only consider his conduct toward James McIntyre and Glenna McIntyre.

As for Defendants Consol Pennsylvania Coal Company, Consolidation Coal Company, Consol Land Development, the Monongahela Railway Company, Pollock, Pollock and Thomas, David Boggs and the Upshur Agency, you may consider their conduct toward any or all of the plaintiffs.

In considering whether to award punitive damages, you may consider all of the following factors, the

character of the defendant's act or action; the nature and extent of the harm to the plaintiffs which the defendant caused or intended to be caused; the wealth of the defendant insofar as it is relevant in affixing an amount which will punish him and deter him and others from like conduct in the future....

The amount of punitive damages assessed, if any, must be measured by your consideration of the factors which I have enumerated as they apply to each particular defendant.

The amount of punitive damages awarded must not be the result of passion or prejudice against the defendant. The sole purpose of punitive damages, and the only purpose for which you may make award and set an amount of punitive damages is to punish the

defendant's outrageous conduct and to deter the defendant and others from commission of like acts. It is not the purpose of punitive damages to serve as compensation for the plaintiffs.

EXTRACT FROM JUDGE TEITELBAUM'S CHARGE TO THE JURY OF FEBRUARY 20, 1987.
TRANSCRIPT 2615-2617

If you find that the conduct of defendants was outrageous, you may award punitive damages as well as compensatory damages in order to punish said defendants for their conduct and to deter the defendants and others from the commission of like acts.

A person's conduct is outrageous when he acts with a bad motive or when he acts with reckless indifference to the interests of others. In considering a claim for punitive damages, the state of mind of the actor is vital. The act must be intentional, reckless or malicious.

If you decide that a plaintiff is entitled to an award of punitive damages, the amount of such damages must

be fixed by you. In doing so, you may consider all of the following factors: (1) the character of the defendant's act; (2) the nature and extent of the harm to the plaintiff which the defendant caused or intended to be caused; (3) the wealth of the defendant insofar as it is relevant in fixing an amount which will punish him and deter him and others from like conduct in the future.

The amount you assess as punitive damages must bear a reasonable relationship to the amount you choose to award as compensatory damages.

Your must determine whether punitive damages are to be assessed against each defendant by that defendant's conduct alone, and the amount of any punitive damages assessed

must be measured by your consideration of the factors which I have enumerated as they apply to each particular defendant.

While you will return your award of compensatory damages, if any, in one lump sum amount as to all defendants, you must return a separate verdict as to punitive damages, if any, against each of the defendants, because you have to consider these factors which differ as to each defendant.

The amount of punitive damages awarded must not be the result of passion or prejudice against a defendant. The sole purpose of punitive damages and the only purpose for which you may make an award and set an amount of punitive damages is to punish the defendants' outrageous conduct and to deter the defendant and others from commission of like acts.